UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 23-cr-80101-AMC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD J. TRUMP, WALTINE NAUTA, CARLOS DE OLIVEIRA,

Defendants.

Fort Pierce, Florida

March 1, 2024

10:02 a.m. - 3:00 p.m.

Pages 1 to 201

TRANSCRIPT OF SCHEDULING CONFERENCE AND MOTIONS
BEFORE THE HONORABLE AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

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STENOGRAPHICALLY REPORTED BY:

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Honorable Aileen M. Cannon
United States District Court
Fort Pierce, Florida

(Call to the Order of the Court.)

THE COURT: Good morning. You may all be seated.

All right. Let's call the case, please.

COURTROOM DEPUTY: United States of America vs. Donald J. Trump, Waltine Nauta, and Carlos De Oliveira, case number 23-criminal-80101.

THE COURT: All right. We will get appearances first, starting with counsel for the Office of the Special Counsel.

MR. BRATT: Good morning, Your Honor. Jay Bratt and David Harbach on behalf of the United States.

THE COURT: Good morning to you both.

Who is here for the defendants?

MR. BLANCHE: Good morning, Your Honor. Todd Blanche, and I'm joined at counsel table with President Trump and also my co-counsel Emil Bove and Chris Kise. Good morning.

THE COURT: Good morning.

MR. WOODWARD: Good morning, Your Honor. Stanley Woodward and Sasha Dadan, and with us is Mr. Nauta.

THE COURT: Good morning to you as well.

MR. IRVING: Good morning, Your Honor. John Irving and Donnie Murrell for Mr. De Oliveira who is here as well.

THE COURT: Good morning.

All right. We have a full house. I'm going to start off with some preliminary remarks.

As we have done in the past, there is an overflow room

set up in the courthouse with the live feed into the courtroom. If at any point something goes wrong with the transmission, I ask our IT team to please advise me as soon as possible so we can rectify any issues.

Second, for those of you who have a seat in the courtroom and to minimize disruption, I ask that you remain seated while the court is in session, unless there is an emergency.

And third, as I have indicated before, the use of any electronic devices is strictly prohibited in the courthouse. This is by administrative order and that includes, of course, this courtroom, along with the overflow room. So I expect everybody's close adherence to that rule, understanding too the penalties set forth in that order for knowing or willful violations.

Now, for the purpose of today's hearing, as I noted in a prehearing order, this is a combined scheduling conference and hearing to discuss, first, the balance of the pretrial deadlines and hearings in this case since entry of the Court's partial scheduling order at docket entry 215. As the parties might recall, that order, entered in mid November of last year, set forth the first batch of initial pretrial deadlines and set this conference to discuss remaining deadlines and motions in a reasoned manner.

To that end, and to best navigate the pretrial phase of

this complex proceeding, I ordered and received yesterday competing proposals on matters of scheduling which I have reviewed. I expect the parties to be prepared to discuss those proposals in light of the numerous pretrial motions that have been filed to date, along with the associated requests for hearings. And by latest count, I think the pretrial motions stand at 20, which includes a substantive CIPA Section 4 motion as to the former president.

Now, as part of this scheduling discussion, I also ask that counsel be prepared to discuss the scheduling of requested hearings on the defense motions to compel discovery, which consist of six motions to compel in one consolidated filing plus attachments, and which present a contested and possibly threshold question about the definition of the prosecution team for purposes of discoverable information in the possession, custody or control of the government.

I think the scheduling discussion will lead us probably to lunch, maybe less, so I anticipate recessing for about an hour around noon, and then resuming for an afternoon session to hear legal argument from the parties and also from the Press Coalition as Amicus on the various pending matters related to sealing and redactions in the case. Those issues have now been raised in five pending motions on issues related to sealing and redaction of voluminous exhibits appended to pretrial motions in this case. And they now implicate numerous

pretrial motions filed temporarily in camera.

So with that broad agenda in mind, let us begin. I'm going to ask that for each of the attorneys presenting argument, that you do so from the podium. I will have some questions as we go along and we will do some back and forth as necessary.

So with that, let me start with counsel for the Special Counsel on issues related to scheduling.

MR. BRATT: Thank you, Your Honor.

Like the Court, we also received the defense's proposed scheduling order last night and have reviewed it. There is a lot going on in it with the shading and the color coding. They have primary and caucus dates, Mr. Woodward's other trial, the apparent -- what appears to be a vacation by Mr. Woodward in August that takes him out of the box for almost the entire month; he can discuss that.

But looking at it, the one thing I think the parties do agree on is that this case can be tried this summer. We have proposed the July 8th date. We think that's the better date. And we think it is doable.

THE COURT: All right. So let's, I guess, dig into the details. I see that you have allotted what appears to be one day for a hearing on motions to compel and one day for a hearing on pretrial motions, which, of course, at this point, I believe consist of at least 13 substantive pretrial motions,

many of which involve lengthy exhibits and attachments. And so I'm just curious, Mr. Bratt, how that's going to work, and to accommodate, of course, enough time for judicial resolution of these motions.

MR. BRATT: Sure. And every Court is different. We think that some of these motions are ones that the Court can decide without argument. We understand that one day may not be enough, but we think that a lot of those motions can be argued in a day, or a day or two. We disagree that with respect to -- I will call them the Rule 12 motions, the most recently filed motions. We disagree that with respect to the Rule 12 motions, that any evidentiary hearing is necessary. We will respond to their request for a Franks hearing, but we don't believe they have met that very high standard. So for just legal argument on these motions --

THE COURT: The high standard that you're referring to is the Franks standard?

MR. BRATT: Yes, Your Honor, the Franks standard. Correct.

So for the legal standard -- I mean, the -- just to do oral argument on these motions, maybe a second day, but we don't think it's going to take as many days or be as complicated as the defense believes.

THE COURT: All right. Well, I think to try to do 13 substantive motions in one day, even two days is -- seems

unrealistic and would, I think, sacrifice the Court's consideration and hearing on those matters. So a more realistic assessment of hearing time in your view would be what?

MR. BRATT: So, again, we want to be flexible. We want to be reasonable. I would say three days at the -- at the outer limit.

THE COURT: All right. Now, what is your view on the evidentiary hearing with respect to the motion to compel?

MR. BRATT: We, again, don't believe they've met the high standard. The way Mr. Harbach and I have divided things, if you want more legal argument on that, I will turn it over to Mr. Harbach. I'm sort of more focused on the scheduling today.

THE COURT: Okay. Okay. But just in terms of scheduling for the hearing on the motion to compel, I guess, first, do you view that as a Rule 12 motion seeking discovery under Rule 16?

MR. BRATT: So I don't know if you would call it a Rule 12. We believe it is a motion that can be handled through oral argument. Actually, I think that's one of the few dates that we -- both sides agree upon, which is, I think, March 20th. Or maybe we're March 18th, they're March 20th.

I would add that we would likely have to do part of that argument in a secure facility since they do have their classified supplement to their motion to compel. But we

believe, again, argument on that motion can --

THE COURT: So you don't see any factual disputes as presented based on the showing made thus far?

MR. BRATT: We don't think there are any relevant factual disputes.

THE COURT: Okay. And why is that?

MR. BRATT: Well, the biggest factual dispute is in the narrative of how this case came into being. That is not something that is relevant to any request for discovery. It is not an issue the Court has to resolve. If -- they may be competing versions at trial, they may cross-examine some witnesses on that subject. We may have some views in our motions in limine about what is proper with respect to that. But we don't have to have a mini trial on what happened between January 20th, 2021, and February of 2022.

THE COURT: Does that not have any implication, though, to the definition of the prosecution team according to 11th Circuit standards on that issue?

MR. HARBACH: Your Honor, I apologize for interrupting, but as Mr. Bratt said, if Your Honor wants to entertain argument on that portion now, I will request leave to argue that.

THE COURT: Well, it's an argument related to scheduling. If you want to stand in for Mr. Bratt on this, you are welcome to.

MR. HARBACH: Thank you, Your Honor.

MR. BRATT: Thank you, Your Honor. I will be back for the others.

MR. HARBACH: Good morning, Your Honor. Sorry for any confusion. We divided duties based on the different items on Your Honor's scheduling order, so that's why I'm doing this one.

On the scope of the prosecution team, in their motion to compel, the defendants, I think it's important to say, first of all, they seek discovery on a single issue; and that is what Your Honor has pointed out, the scope of the prosecution team. But -- and equally important to remember at the outset, that in the government's view, what's really going on here is that the defense is trying to use the scope of the prosecution team in the context of their motion to compel as a doctrinal hook to suggest that a hearing is necessary on what Mr. Bratt just alluded to. There are baseless theories about the origin of this prosecution.

Now, whether the Court credits what I just said or not, in the government's view there are plenty of other reasons not to permit a hearing of the sort that is requested here.

First, it's totally unnecessary. As we have explained in our papers, the Court can resolve many of the defendants' requests without even reaching the question of the scope of the prosecution team. There is the threshold question, just as an

initial example, of whether any of what they seek is even discoverable, which, as we pointed out in the papers --

THE COURT: Right. But why wouldn't that happen after case file reviews, following a -- a defined prosecution team? And then -- and then you would make determinations about discoverability, assert whatever privileges you think might be warranted.

MR. HARBACH: Because in our view the requests that they have put forth in their motion to compel are deniable on their face as not seeking discoverable information irrespective of what the scope of the prosecution team is. And that's for at least three reasons. And these are all laid out in our papers. Many of the requests are not material to preparing the defense. If the Court decides that that is the case, it doesn't matter what the scope of the prosecution team -- if the request doesn't seek discoverable information under Rule 16, that's the end of it. That's --

THE COURT: Okay. So let's just, as an example, take the folks that were involved in -- from the Intelligence Community making decisions in consultation with the Special Counsel about what to use, litigation strategy, and so on and so forth.

MR. HARBACH: Sure.

THE COURT: So taking that as an example, why haven't the defendants made a good faith colorable showing that they're

entitled to better understand the degree of interconnectedness, given -- given that -- given that working relationship? Which I'm interested in hearing more about in terms of the degree of collaboration.

MR. HARBACH: Okay. Your Honor just asked me why haven't they made a good faith showing that they are entitled to this. And I'm going to answer that question. But if Your Honor will permit me to preface my answer just for a moment. Because this implicates not only the Intelligence Community components that they've sought to allege are part of the prosecution team, but others as well.

Let's just -- I think it's important to state, for the record, what the defense's position is. And this is the list of entities that they say is part of the prosecution team. And I will try not to go too fast.

THE COURT: And -- but, no -- and I understand that's a very lengthy list. But in a more functional sense, the people within the Intelligence Community that actually worked with the Special Counsel in making particular decisions about what to charge, what could be used --

MR. HARBACH: Oh, okay.

THE COURT: -- what could be redacted, what could be withheld --

MR. HARBACH: Okay.

THE COURT: -- those sorts of quite important

decisions, I think, arguably could say are very comfortably within the prosecution team definition.

MR. HARBACH: Yes. Were that the case, we might agree with you. No member of the Intelligence Community, no single person had any role whatsoever in consulting with the Special Counsel about what should be charged here. That did not happen. And that is the point we've tried to make over and over in our papers.

THE COURT: All right. So, then, perhaps maybe some sealed declarations to that effect or something that would shed light on the degree of collaboration, either pre- or post-indictment, whatever the facts indicate.

MR. HARBACH: If Your Honor will allow me, I think that to answer that question about why a -- a sealed declaration from somebody at the National Geospatial Intelligence Agency isn't necessary here, I just want to make a couple of points.

First, as we laid out in our papers, none of these entities, the long list that Your Honor mentioned and -- because you don't want me to, I won't go through the list of --

THE COURT: Well, it's there. I don't think we need to waste time reading them.

MR. HARBACH: It's 20 -- it's 20. It's 20. 20 different entities, including the White House, a whole bunch of members of the Intelligence Community, the State Department, the Department of Energy, and the United States Secret Service.

The list alone, we think, is -- carries some message about the frivolousness of their argument. But I will leave that. I will leave that.

More to the point, none of those agencies that have -- that are on that list were involved in formulating investigative strategy, collecting evidence, issuing subpoenas, interviewing witnesses or doing anything remotely resembling pooling investigative strategies with the Special Counsel's office. Now, all those things that I mentioned, as I know Your Honor knows, are factors that appellate courts have said -- well, sorry, courts have said should be taken into account in assessing this question.

Now, I'm going to get to your question. The defendants claim that they are entitled to a hearing on the scope of the prosecution team, but with no evidence at all to the contrary, zero. And more to the point, they cite no authority, no authority at all, justifying an evidentiary hearing to rebut the proffers that the government has made in its papers with, again, not a single iota of countervailing evidence. They don't get to say we should have an evidentiary hearing on what Your Honor just suggested a moment ago or demand a declaration from some official at one of these intelligence agencies just because they don't like -- they don't like it. They don't like the fact that they don't have any evidence to support their theory.

Again, back to the case law. There is no -- they have cited no authority. We think there is no authority for holding that they get an evidentiary hearing to explore prosecutors' interactions with other governmental agencies in a criminal investigation. I mean, that's Saab Moran. There is no entitlement to discovery on how the government collects and prepares discovery. And if -- I mean, they're going to get up here and argue in a minute -- if the answer -- if the answer is, well, all these agencies are effectively tools of President Biden, that's what we understand them to be saying, well, that's a selective prosecution claim. That's not a Rule 16 discovery, motion to compel claim. That's an Armstrong claim. And granting relief under Armstrong requires a rigorous showing. That's all I will say about it now because that's the subject of additional briefing. But it's rigorous showing.

And as we point out in our surreply filed recently, a hearing on that subject would be unprecedented in this district. So this is what I meant when I started, this reveals what is really going on here. This whole exercise -- I'm -- this whole exercise is an effort to try and wring out of this Court an evidentiary hearing out of their motion to compel. That is just an end run around Armstrong, which they know they can't satisfy, and so they're trying this alternate means to get it. That's what this really is all about.

So I hope I have answered your question about why the

government should not be put to the burden of producing declarations to substantiate all of the proffers that we made, when they have produced not a single piece of evidence to suggest that any of them is false.

THE COURT: All right. I mean, ordinarily parties' entitlement to a hearing requires an examination of whether the seeking party has alleged facts that, if true, would entitle him or her to relief. And so I will have these questions for defense counsel, but it seems like you're almost requiring of them a degree of -- a burden of proof at this stage merely to obtain a hearing, which I'm not quite sure is consistent with the general standards for allowing a party to obtain an evidentiary hearing; and, in this case, an opportunity for both sides to provide whatever evidence they deem relevant or appropriate, including potentially folks on -- on the government's side in the form of affidavits or other evidence.

MR. HARBACH: Were that the case in the abstract, the Court might well be right. But this isn't that. This is -- this is a selective prosecution claim in effect. It requires a higher standard. And even if you don't --

THE COURT: Right. But hold on one moment. The prosecution team issue is framed as "we need a definition of the prosecution team." We then need case file reviews, as far as I can tell. And then, depending on whatever discovery we obtain, then we go one by one on the potential additional

requests for -- for compelled discovery. And so why wouldn't that be the logical step-by-step process here?

MR. HARBACH: You're right. That is the way they framed it. And the answer is what I have been trying to say this morning. The reason that they have set the allegedly threshold question of what the prosecution team is, as being a necessary predicate to resolve the rule -- sorry -- the motions to compel, the reason that they're doing that, is what I have said a couple of times already. And what we're saying is, Number 1, that's wrong. You don't have to decide the scope of the prosecution team, even as a theoretical matter, in order to resolve their motions to compel. And second, even as to the tiny subset for which that -- that might -- it might actually be relevant to the Court making the decision, they don't get an evidentiary hearing on it for the reasons I said a moment ago. That's the way -- that's the way we see it. And that's why we think that no evidentiary hearing is even remotely warranted here.

This isn't just a regular run-of-the-mill motion on which a party is seeking a hearing, like Your Honor was describing a moment ago. There is a -- there is a higher standard here that is required, both by Saab Moran and by Armstrong.

Now, the government recognizes, I think most criminal lawyers realize, that in this situation, yeah, that's a high

standard. It's rare. And it should be. It should be.

THE COURT: All right. Let me -- let me hear again from Mr. Bratt just circling back on some scheduling issues. I'm sure I will have more questions for you, Mr. Harbach --

MR. HARBACH: Very good, Your Honor.

THE COURT: -- later on.

Thank you.

Again, looking at the proposal here for scheduling, I think it's important to do things in a reasoned way and one that doesn't jump ahead in a way that then becomes disorganized for judicial resolution purposes.

And so in your view, Mr. Bratt, what are sort of the immediate priority items to address, let's say, in the next 30 days?

MR. BRATT: Yes, Your Honor.

And I think maybe --

THE COURT: Oh, and I'm sorry to interrupt you, but taking into account the redaction/sealing issues which have now essentially put a hold on full briefing of the pretrial motions. To some extent, there have been, of course, inabilities to file publicly certain documents, and sort of before those issues are resolved, it's hard to see these pretrial motions being fully briefed and then heard in open court without doing some sort of constant courtroom closure framework which seems a bit odd.

MR. BRATT: So I think our hope, and especially the proceedings that will occur this afternoon should help resolve those issues. We don't propose having the hearing or hearings on the Rule 12 motions until April. So we're still more than -- I think April 3rd is the date that we proposed. So we are more than a month out from that. While it is true that the public is limited in what it can see, the Court has everything, we have everything. When we file our oppositions, they will have everything from us.

So the parties can work on those and start working toward a resolution and working toward whatever hearings and arguments the Court wants to hear next month.

THE COURT: All right. It's just that what's been generated by the -- by the competing arguments on sealing and redaction is essentially a docket that is now becoming full or fuller of seal requests in a way that I'm not sure is consistent with the presumption of public access. And so I'm concerned that now we have all these pretrial motions; they implicate references to discovery material which then prevents the public filing of those motions. It prevents the public hearing on those motions to at least some extent. And then it might even impact the judicial orders on those motions. And it just becomes more complicated in that sense, given -- like, I think, there are five pending motions on redaction alone.

MR. BRATT: So I think, Your Honor, one important thing

to recognize, as we argued in our papers, is that many of the attachments that are being appended to these motions, they cite them for maybe one or two points. I can think of one example where they -- there is a 10-page FBI 302 of a government witness. They are essentially relying on one line in that 302, yet they have put the entire 302 in. They've put entire grand jury transcripts in. If the Court focuses on what these materials are actually being cited for, it is fairly minimal in contrast to the size of what they've appended to their briefs.

And, again, I think if the Court, hopefully through the argument it hears this afternoon and the briefing and even the contribution from the Press Coalition, the Court should be able to come to a decision on, all right, this is what the public facing part of this will look like. And at the same time, this is what the Court and all the parties have in front of them for resolution of the motions.

THE COURT: Okay. Does any of what you just said require the Court's ruling to be what the Special Counsel has sought 100 percent?

MR. BRATT: I always want to be careful about "100 percent" because sometimes 98 percent will be satisfactory. But we do think there are important principles at stake. So that, again, for example, there may be some email chains that they want to have, and they're using it for one purpose, but elsewhere in the email chains, other witnesses,

what other witnesses may have said to an FBI agent are in that same chain. That does not have to be -- one, it's not anything the Court needs to consider to decide the motion, but it is also not something at this point in time before witnesses start taking the stand that has to become public.

THE COURT: All right. Okay. Thank you. I may have some additional scheduling related questions as we proceed, but let me turn and hear argument from counsel for --

MR. BRATT: May I just address one -- because I think we will probably go back and forth on some of the unclassified dates. But our biggest problem with their scheduling order is that from the end of this month through late May nothing happens. And we understand a lot of that is driven by the trial that Mr. Blanche has with President Trump. Just two observations. One, when the Court set the May 20th date, that was a known fact that trial. And two, and I made this point before, and I know Mr. Blanche wasn't happy with it, but Judge Merchan in New York about two weeks ago made the same point, which is that he took this representation knowing he had the other representation. And --

THE COURT: I'm sorry. He took this representation --

MR. BRATT: He, Mr. Blanche, took on this case after he knew that he already had the New York case. And, again, that is his choice. It's President Trump's choice of counsel. We respect that. But that can't drive the dates here.

THE COURT: Right. But it's not just the choice of counsel, it's -- it's the accused's right to be present and participate.

MR. BRATT: Yes, yes.

THE COURT: And so that has to come into the equation to some extent within reason.

MR. BRATT: Right. So that -- which leads to what I was about to say next. That if you look at our proposed scheduling order, we have, I think, only one hearing scheduled during that period of time on April 3rd, which, our understanding is that is a day that the court New York is not sitting. And the remainder of the dates that we have during that period are court filings, and very crucial court filings to keep this case moving along.

THE COURT: But I can assure you that in the background there is a great deal of judicial work going on. So while it may not appear on the surface that anything is happening, there is a ton of work being done in the background because, of course, as I said at the beginning, we have about 20 pending motions just sitting here right now.

MR. BRATT: We would -- we can tell by the hour that and the days, the weekend days, that we sometimes get notices from the Court, we are well aware everybody here is working very hard, and we are very grateful for that. But the case does need to move. I guess the key deadlines that we really

have the most dispute about, if I may take a couple minutes to go through those --

THE COURT: Yes, please.

MR. BRATT: -- are the CIPA deadlines.

So we begin that with our sort of duelling propositions as to when the defense makes its CIPA 5 notification. We say it should be on the 18th of this month, and they want to wait until June 17th. They have had the classified discovery for months now. We know from their motions to compel that they are well steeped in it. They spent a lot of time ex-parte with Your Honor talking about the classified discovery. They have it. There is no reason that notice should not be filed. And, you know, the 11th Circuit in Collins called the CIPA Section 5 notice the central document in CIPA. Because that is what leads to how the case can be presented at trial.

So we think a -- and we understand there may be some other orders from the Court, and there may be some additional classified discovery, so there may have to be a supplemental notice at some point, but we need to get moving on the CIPA Section 5.

THE COURT: And could you envision potentially to the extent some additional evidence becomes -- or is triggered by the Court's ruling on a motion to compel, for example, again having not made any of those decisions, of course, then could you envision a second CIPA Section 5 notice?

MR. BRATT: We could envision that. And as we have -- we have been up front with the Court. That also may result in another round of CIPA Section 4 for us. Obviously, we have to see what it is that the Court would be ordering and we have to see what the comfort level is of the equity holders and how that might be presented. But --

THE COURT: On that point with the equity holders, how does it work, just in practice, when you sort of get permission to do things or at least you have a dialog? Can you shed some light on that?

MR. BRATT: Sure.

In most of these agencies, and particularly NSA, CIA, they have a litigation division within their general counsel's office. That is our point of contact with the agencies. Attorneys in the litigation units or the litigation divisions, whatever the agency calls it, they're the ones that receive our requests. They go to the components within the agencies, advise them of what our requests are. They come back to us with the positions of the operators, for lack of a better word, as to their comfort level with materials possibly being shown in open court, even in a redacted or limited way. And it's a dialog that we have with them.

I know that the defense characterizes that in their classified reply supplement -- and I'm not going to say anything classified that, oh, they're the ones who make the

decisions; it's far from that. And part of what we -- part of our discussions and negotiations with them -- and it really is a negotiation -- is also setting red lines. That if we don't get the types of rulings that we hope we can get or think we can get, we may have to pull the plug on some cases.

In recent years there was the -- we cited the Rosen case to you from Judge Ellis. That eventually reached a point where the pain level for the equity holders was too much; we had to dismiss it. There was a case involving --

THE COURT: That was the case, I think, 3-1/2 years into litigation ended?

MR. BRATT: I don't know if it was quite that long. I mean, there was an appeal to the 4th Circuit that made it longer. Judge Ellis is incredibly efficient. I would be a little bit surprised if it was three years with him, but, yes, there was a lot of litigation.

THE COURT: I think I just mentioned that. I think he wrote a treatise on that and mentioned --

MR. BRATT: Yes.

THE COURT: -- mentioned the timeline.

MR. BRATT: That -- that very well -- you probably know more about that than me if you read his -- read an article he wrote in the treatise.

There was the Drake case from the District of Maryland that involved NSA computer information; that had to be

dismissed. Those are the types of discussions that we have with them.

And to follow up on what Mr. Harbach was saying, and at least what we think the current state of the law is -- or as the law on the scope of the prosecution team has evolved from the earlier 5th Circuit cases, now to the 11th Circuit cases, authority is the lodestar, is the key criterion. And we have very little authority over the CIA and the NSA. They have a lot of discretion in what they will or will not let us use.

THE COURT: I think if you go back to the 5th Circuit's case, Antone, in 1979, there is a discussion of pooling investigative resources. What do you have to say about that? I know there has been some mention in the papers about statements made in the civil proceeding with respect to the interrelationship. Again, arguable between the Special Counsel's office and the Intelligence Community.

MR. BRATT: Well, certainly by the time the Special Counsel's office was set up, what the Intelligence Community was doing in looking at the documents and making certain assessments, we were not part of at all.

In terms of -- you know, if you talk about, sort of, again, in those cases -- and I know to -- in -- in -- you look at those cases, and usually what they're talking about is the investigative agency with whom the federal prosecutors are working very closely. And they're pooling resources.

Did we require the CIA and NSA, NGA, et cetera, to expend resources to respond to our requests? Yes, we did. Did we pool resources with them in the sense that, oh, you do these interviews, we will do those interviews, we will all come together? No, nothing like that happened.

THE COURT: Okay. Okay. All right. And let me just understand just as a factual point -- I know in one of the letters drafted by the Special Counsel with respect to the definition of the prosecution team -- and I'm going to get the exact quote. I just want to understand what it -- what it means.

As I understand it, your review of the prosecution consists of, quote, the prosecutors of the Special Counsel's office and law enforcement officers of the Federal Bureau of Investigation who are working on this case, including members of the FBI's Washington field office and Miami field division.

So I would like to understand what do you mean by "working on this case," as of when? What's your timeline, so to speak --

MR. BRATT: Sure, sure.

THE COURT: -- what you're working right now. Starting when? Is it the whole Special Counsel's office? It's -- it's hard to -- it's hard to discern from that definition.

MR. BRATT: Sure.

When this case first came in -- and I know they have

their theory on the referral. But I will say, when the referral came in, right around that time, in February, the case -- the matter within the FBI was assigned to the Washington field office, and a particular squad in the counterintelligence division of the Washington field office. Those were the agents. And a couple of them are actually in the room today. Those are the agents who began going out and doing the initial round of interviews. And they have been on the case all the way through now. They would take taskings for us. We would, even before, in the very early stages of the case, talk to them about who were the likely people to be interviewed, who should be interviewed next, et cetera. Obviously, as the case developed and more evidence came in, we began working much more closely with them. And --

THE COURT: These are still agents in the Washington field office?

MR. BRATT: In the Washington field office, right.

THE COURT: Okay.

MR. BRATT: There came a point in time around April of 2022, when the agents began doing interviews in the Southern District of Florida. And at that time, they began working with some agents in the Miami field office, in particular the resident agency in West Palm Beach. And those agents, not as many, but a handful of those agents have been pretty much involved. They have other responsibilities, but have been

involved throughout the investigation, including when the case was transferred to the Special Counsel.

THE COURT: Now, from the date of the referral until the present, have any agents outside of either of those field offices had any connection to this case? And I know that's -- that's broad. But I say that for a reason. Because you're -- you're narrowing it to two field offices. There is some argument about folks at headquarters potentially being involved, and I think it's important to get clarity.

MR. BRATT: Sure.

So at headquarters, this was in a section of the counterintelligence division, there was an assistant section chief who was sort of the point of contact there. There was a unit chief who was the point of contact and was involved and continued with the Special Counsel to be involved. I mean, again --

THE COURT: So why wouldn't those people, at the very least, be part of the prosecution team?

MR. BRATT: And we were not denying that they are.

THE COURT: Oh, okay. That's the nature of my question.

MR. BRATT: Yeah.

THE COURT: Because, as framed, it seems the folks who are, quote, working on this case include -- and maybe there is more to it, that's just not specified in that definition.

That's what I'm trying to probe, is who beyond the two field offices, from the FBI at least, has, quote, worked on this case?

MR. BRATT: So on a sort of day-to-day level, it was about two or three people in FBI Headquarters. And we have produced their materials in discovery.

THE COURT: Okay. Now, prior to the referral, were there any FBI agents or members of the Department of Justice who were working on the issue of missing boxes or -- or information that was being requested from NARA?

MR. BRATT: Not until close to the time that NARA formally referred the case to us.

THE COURT: Is there anything you wish to add?

MR. BRATT: No. I just think Mr. Harbach is correct in advising me that it's very important to separate what any connection to the case is from the people who actually were responsible for carrying out tasks that we gave them. Your Honor has used the term "working on the case." That is the definition --

THE COURT: Well, that wasn't my term. That was the term provided by the Special Counsel.

MR. BRATT: And that is what we mean by that, the people that were working --

THE COURT: I'm just trying to figure out, what does that mean? What does it mean to be working on a case versus

being consulted or being part of the discussion? And so those things are a little bit vague. But in any case, I do want to stay focused on the scheduling issues. If you want to add any more about that, then I want to hear from the defense attorneys.

MR. BRATT: Let me go through the CIPA issues that we have. So one, CIPA -- CIPA Section 5 notice in -- in June is way too late.

Second, the defense has something that they call a -- having the government file a response to their CIPA Section 5 notice. Well, a response to the CIPA Section 5 notice is a 6A motion. There is no such thing as some general response. Because then they also, on July 9th, want to have a hearing on the sufficiency of the CIPA 5 notice. And that also --

THE COURT: All right. I'm sorry. I want to make sure I know where you are. So you're looking at page 5 of docket 357?

MR. BRATT: I think so. We kind of --

THE COURT: The chart.

MR. BRATT: Yes.

THE COURT: The defense proposal.

So the deadline that you say is sort of a non- -- a non-deadline is which one?

MR. BRATT: There are two non-deadlines. The first is

the June 24th, government filing a CIPA 5 notice. That is nowhere in CIPA.

THE COURT: Okay.

MR. BRATT: And then a July 9th hearing on the sufficiency of the CIPA 5 notice. And as a legal matter, that -- their notice should be sufficient. We shouldn't be having to litigate it. The 11th Circuit is actually clearer than a lot of circuits in saying their descriptions of the classified information they seek to reveal needs to be particularized -- particularized.

THE COURT: So you don't really know what that means? I don't -- hearing evidentiary, as necessary, on sufficiency of CIPA Section 5 notice.

MR. BRATT: It's not a thing. It doesn't exist in CIPA. The expectations should be -- is that they will comply with CIPA 5's requirements.

THE COURT: Okay. So, Defense Counsel, please be prepared to address these two issues, the June 24th proposed government response to CIPA Section 5 notice and the July 9th allotment for a hearing on the sufficiency of the CIPA 5 notice.

MR. BRATT: All right. Then under their schedule, they give us just two weeks after getting the CIPA 5 notice to file our CIPA 6A motion.

THE COURT: How much time would you like?

MR. BRATT: We -- in our proposal we ask for four weeks. Because we will likely -- well, we have to go to the equity holders and we will likely be filing -- we can reassert or assert anew the classified information privilege in 6A. So we're going to have to get declarations for that.

THE COURT: So you are asking for four weeks between the Section 5 notice --

MR. BRATT: And our 6A motion.

THE COURT: Okay. Gotcha.

MR. BRATT: And just also, when they described the 6A motion, they say it deals with the silent witness rule and how evidence is handled in the courtroom. Silent witness rule being a means of showing the jury and the Court the full classified -- or a version of the classified, the public seeing a more redacted version of the classified evidence.

But, yes, procedurally, the silent witness rule is worked out throughout the Section 6 proceedings, but the key thing for Section 6 is the Court ultimately ruling on the admissibility of the classified information they seek to disclose. So it's more to it than as they describe in their notice.

Then the other deficiency that we see with their -- with their proposal is that they have a CIPA 6A hearing from between June 23rd to the 26th. I think we had it for two days, but, again, it will take probably a couple of

days to do the 6A hearing.

THE COURT: I'm sorry. Say that one more time with the dates.

MR. BRATT: Yes. July -- I'm sorry -- July 23rd through July 26th.

THE COURT: Okay. So what would you like to alert me about that?

MR. BRATT: So what I want to alert you to is that they then have our 6C motion due on July 31st, so possibly five days later. The reason that's an impossibility -- well, it puts pressure not only on us, but also on the Court. Because we cannot file a CIPA 6C motion until the Court has made its written rulings on -- on the admissibility of the classified information.

In our -- in our -- what we submitted over the summer on our motion to continue, we had it 14 days from when the Court issued its order. In our proposal here, we have about three weeks between the CIPA 6A and our 6C motion --

THE COURT: So it should be key to the Court's ruling --

MR. BRATT: Correct.

THE COURT: Okay.

MR. BRATT: And then last, they have the CIPA 6C hearing actually occurring after voir dire. And the CIPA 6C hearing has to occur before the jury is -- is questioned and

before it's sworn in. We need to know what the evidence is actually going to look like. That affects, again, the risk tolerance of the equity holders and it also affects --

THE COURT: Wait. Can we back up for just a minute?

MR. BRATT: Sure.

THE COURT: You are saying that -- you're saying they want to do a classified hearing after voir dire?

MR. BRATT: Yes.

THE COURT: I see August 5th as the proposed final hearing on remaining CIPA issues, and then voir dire commencing, at least according to the former president's counsel, on August 12th. I take their proposal to be an alternative one to be considered, notwithstanding their introductory point. But, in any event, is there an inconsistency there between the final CIPA hearing and the voir dire?

MR. BRATT: So a couple of things in their proposal that weren't entirely clear to us. But to the extent that it seemed to suggest that there would be more hearings on CIPA 6C after the jury was empanelled or before it was empanelled but after voir dire, that cannot happen.

THE COURT: All right. That's a fair point. Okay.

MR. BRATT: That's all that I have on CIPA. I'm sure there is some other scheduling things that you will ask defense about and I will come back on.

THE COURT: Okay. Thank you, Mr. Bratt.

MR. BLANCHE: Good morning, Your Honor.

If it's okay with the Court, we are also going to divide up argument. Mr. Bove will address the motion to compel framework and be prepared to address and respond to questions that were just raised to the Special Counsel around the motion to compel, and also potentially some of the CIPA questions that came up at the end. But I will address scheduling.

Look, to be clear, and it's in our papers, we very much continue to believe that a trial that takes place before the election is a mistake and should not happen, and there is a lot of reasons for that that may be obvious. But as they relate to Your Honor in this courtroom, we very much think that it is completely wrong and unfair to the American people and to President Trump that he is going to spend whatever six weeks the Court decides to hold trial, whether it's closer to the government's proposal or closer to our proposal, sitting in this courtroom and not out campaigning for the presidency of the United States. And --

THE COURT: What's your understanding right now about the proposed length of a trial in this case?

MR. BLANCHE: Pardon me.

THE COURT: What is your understanding right now of how long it would take to try this case?

MR. BLANCHE: Our understanding is around -- and the

Special Counsel can correct -- we believe it will be four to five weeks, and that's not including jury selection. But it's also not including the motions we're talking about and the evidentiary hearings which we think are for sure more than just a single day.

So you're talking about taking President Trump off the campaign trail for huge blocks of time for really no reason. The difference between -- we are going to get into the schedule in a moment, Your Honor, but there is a lot of work to do under any of these proposals, even -- even counsel for Mr. Nauta's proposal starting in September, we are working full-time all summer to get there. And the reason why, as an alternative, we offered August is because once you get to September, we're literally -- the campaign is in full swing. It really is in full swing the whole summer, but it becomes more damaging and more harmful to the American people and to President Trump every day that gets closer.

Now, we're going to talk about -- in a minute about how the July date is completely unworkable just from a case-related standpoint. But the easy solution here is the one that we asked for in our papers, which is to start this trial after the election. I think if there were no election, the way this -- the case -- this case would be -- we still wouldn't be ready for trial until close to the November time frame. If we really -- if we really sit back and think about all the

decisions the Court will have to make based upon the pretrial motions, the evidentiary hearings, and the CIPA litigation, we're working ourselves into almost a frenzy, even under President Trump's proposed schedule, with all of the things that have to take place in advance of a trial, and a reason for doing so, aside from what we have argued repeatedly, is this administration's desire to get him on trial before the election. Beyond that, there is no reason. There is no reason this trial can't start late November, which gives us -- the Court, the government, and the defense plenty of time to do all the things we're talking about.

So without a doubt, that is our position. It always has been and it remains that way. Granularly, the big issues and the problems with the Special Counsel's July date is the fact that President Trump -- that President Trump is going to be on trial in New York between March 25th and, at some point, early to mid May. That's practically an impossibility for the defendant, for President Trump, to be able to effectively prepare for this trial while he's on trial there.

Now, the Special Counsel has repeatedly suggested that it's kind of on him and on his counsel that we have these conflicting trials. That is not 11th Circuit law. 11th Circuit law, there is plenty of law that addresses this issue and shouldn't need to be -- to be emphasized. But there is plenty of 11th Circuit law that talks about the -- a

defendant's Sixth Amendment right to counsel of his choosing, including the fact that acting because of some sort of calendar control shouldn't interfere unreasonably with a client's right to be represented by the attorney he has selected.

President Trump and myself have been wide open and honest with every court we're in front of about the schedules. This is not a game where we're trying to put off schedules and dates because of -- to play courts off of each other, like some have said. It's a reality. We have a trial that starts March 25th. The people in New York in the beginning -- a year ago, about, said that the trial would last approximately three to four weeks, actually two to three weeks. They have now said it's recognized it's going to be longer. So even when --

THE COURT: What's the current estimate for that trial?

MR. BLANCHE: Including jury selection, approximately six weeks. There is some speculation there because of jury selection, of course. But that's different than even what we said to Your Honor last summer because it's just grown longer. So, you know, when I read the government's --

THE COURT: Understanding that constraint, and I understand that, isn't there at least some work that can be done within that six-week period?

MR. BLANCHE: Oh, absolutely. And our proposal has a lot of work getting done, just not -- not the work that the Special Counsel expects counsel for President Trump and

President Trump to do.

So they suggest a hearing on April 3rd, and they obviously know that Wednesday is the calendar day in New York. But just -- think about what that means. That means that President Trump is on -- in a jury trial all day Monday, all day Tuesday in New York. He has to end up at home on Tuesday night, come to this courtroom, in Special Counsel's view, to argue over a dozen motions, then get back to his home, fly back to New York to have a jury trial the next day.

I don't -- that doesn't even -- I don't know how they say it with a straight face. That's completely unfair. There will be no precedent for that type of ask by a government that's really just trying to do justice. And it just doesn't -- doesn't work. We have a schedule that puts a lot of work in before that March 25th date kicks in for President Trump, including the motions to compel, which Mr. Bove will address why that is so significant. Depending on the Court's rulings on the various motions to compel, especially the scope of the prosecution team, there will be a tremendous amount of work to be done in producing any discovery that's ordered to be produced or in the Court's deciding motions that we believe can be argued in advance of March 25th. So that's --

THE COURT: So let's just focus in on the immediate future in the next 30 to 45 days. In your view -- I think I asked Mr. Bratt a similar question -- what are, sort of, the

key priority items to get through first sequentially and logically?

MR. BLANCHE: We believe that there could be fully briefed motions on some of the 12(b) -- 12(b) issues, including selective and vindictive prosecutions. We think that is extraordinarily important. And we think there is a lot of evidence that the Court will hear about in argument and in a hearing, if ordered, that will -- that will cause a lot of -- a lot of work will need to be done when the Court rules on that. We think that can be -- can be done.

We think there can be an oral argument on the -- on the Presidential Records Act and the vagueness challenges to --

THE COURT: Can you explain to me a little bit -- I saw that as a hearing to be held before your motion to compel hearing. I saw that and I was wondering if you could explain the rationale behind selecting that sequence.

MR. BLANCHE: Of course. We believe that putting aside the Supreme Court's immunity argument for a moment, which is why we think that should be put off until the Supreme Court rules. The PRA issue and the vagueness challenges on the 793 will be fully briefed and may not require much of a hearing. We haven't seen the response on the PRA argument. So, for example, if the government argues that President Trump was not president when he took the boxes on the plane on the date that they allege, we might need to have a hearing to prove that he

was. I don't expect that would be a complicated hearing. So there might be some evidence the Court needs to take in, which is why we said a hearing may be necessary.

But that's really, in our view, argument, and then a decision -- a decision by the Court. So we think that can get done before -- that argument can get done before the March 25th trial starts. And then the motion to compel, which Mr. Bove can address more weeds on that.

We can have a hearing. We are prepared to have a one- -- we built in two days of hearings, if necessary. That -- that gets a lot of work on everybody while President Trump is on trial in New York. And so we're not suggesting we sit by.

And, look, I think there is some built-in -- in the government's proposed schedule, for example, requiring expert disclosures by March 18th, when there is -- on the defense, when the Court hasn't ruled on, we think, significant issues that will counsel whether we have expert disclosure --

THE COURT: Can you be a little more specific with that?

MR. BLANCHE: Sure.

So in this case the nature of the classified documents and whether they're closely held, that -- that issue, and how we might want to bring that to the jury's attention could include expert testimony. But whether we decide to do that

depends significantly on the rulings.

THE COURT: That's what I'm trying to understand. Why do you need a court ruling to do a -- to do an expert notice?

MR. BLANCHE: Well, because we don't know what the Court is --

THE COURT: So what do you need to know in order to make that decision? Because it's not the subject of the pending motion; correct?

MR. BLANCHE: Correct.

THE COURT: Okay.

MR. BLANCHE: That's correct.

Look, I think we need to understand -- if the Court agrees with President Trump, and orders a disclosure of what we think we're entitled to around all the background information around the various charged documents and their sourcing and the reason why they were classified at the level they were, and the -- the reason why the government claims they are so closely held in an NDI. Until we know whether we're going to get all the information, we -- we -- we're in a box about whether we need to call an expert on that issue. So that's the reason why we don't think there is -- that that should be something that we're just -- we're forced to decide now.

But more granularly on the CIPA side -- and Mr. Bove can certainly elaborate here -- but they have us -- they have 6A litigation taking place while we're on trial in New York.

And I say myself and Mr. Bove, who is a CIPA expert, we have to do all of that work in a secure facility in this district. And they know that. And they know we're on trial.

So the idea that we would go through -- I will talk about our Section 5 notice in a moment -- but that we would provide Section 5 notice and then litigate the 6A while we're on trial in New York, it's -- I'm not -- I mean, I hate to use the word "unfair" because we're working hard and we're doing what we have to do, but how can they even suggest that to the Court? President Trump has a right to be part of that.

So when are we in the secure facility in this district when we're on trial four days a week? It just -- I think it's -- it borders on bad faith that they would suggest that. And our schedule on the 6A litigation, it's true that -- Mr. Bratt is correct that there is -- we are really putting a lot on the Court and on the parties to hit an August date, but it still is much more realistic to give President Trump and counsel an opportunity to get ready.

And, by the way, if the trial is scheduled when we think it should be, there is plenty of time. And we asked for four days for 6A. Your Honor, we went through Section 4 briefing the last several months. Section 6A is, for sure, going to be as much or even more complicated for the Court and the parties. So they -- the government suggests just two days? That's also completely unrealistic, given the volume of

classified materials and what they already know we're going to be objecting to.

So -- so there is a lot built into our schedule that Mr. Bratt criticized, and I accept that, because it does really put a lot of work on us in July, but the alternative that they suggest is not only unworkable because of the physical presence of counsel not being in the district, nor the defendant, but it also isn't enough time to get done what we need to get done.

So -- and, by the way, the Section 5, the reason -- I accept Mr. Bratt's position that there is no -- there is no reply. I mean, the Special Counsel filed a motion to strike our Section 5 notice. The same Special Counsel -- he is in this courtroom -- is on the case in the D.C. case. It's not in your case, Your Honor, but in the case in D.C., we filed a Section 5 notice. They filed a motion to strike it. So we --

THE COURT: Oh, so that's what you mean by government response to CIPA Section 4?

MR. BLANCHE: We were just as shocked there as Jay Bratt was here on why we put it in our calendar. But that's what they did. So we were giving them an opportunity to make a similar argument here, should they choose to do so. That's the only reason why we included that.

THE COURT: So just so I understand, that was a -- that was a government motion to strike the CIPA --

MR. BLANCHE: By the Special Counsel, correct.

THE COURT: Okay. What do you have to say, though, about the other one? The hearing, evidentiary as necessary, on sufficiency of CIPA 5 notice?

MR. BLANCHE: Well, because -- I don't want to get into -- the reasoning that they gave that our notice in D.C. should be struck had to be -- was based upon the sufficiency of our notice. So if they're going to engage in this argument --

THE COURT: Oh, okay. So that's tied together.

MR. BLANCHE: Totally. If there --

THE COURT: I understand.

MR. BLANCHE: We agree it was not the usual path. And --

THE COURT: Do you disagree with Mr. Bratt's explanation that there needs to be at least four weeks between the defense Section 5 and the 6A hearings?

MR. BLANCHE: I leave that to Mr. -- that's work that the Special Counsel has to do. You know, I think he described the work that that would -- I have no basis to challenge what he is saying, but I certainly challenge the schedule that he suggests, that we should do that in the middle of a trial in New York when we can't be in this district.

THE COURT: Do you also agree with Mr. Bratt that there should be no CIPA hearings conducted after voir dire commences?

MR. BLANCHE: I mean, absolutely not. It just depends. I mean, Mr. Bratt -- I think there might have been a

misunderstanding because some of the scheduled hearings were because of different proposed dates with us and Mr. Nauta. But there are times when, even after voir dire, classified issues come up and you have to deal with them, whether it's a late production by the government. And so -- or something like that.

So to suggest there will be no further classified litigation after voir dire, no, we do not agree with that.

THE COURT: Okay. As far as the schedule in New York, do you have any sense for just whether the Court will be in session every day?

MR. BLANCHE: Yes. So the Court will be in session every day with the exception of Wednesday. There are some potential holidays, including the Jewish holidays in April, where there is potential that the Court may be canceled, but there is nothing set in stone. I think it depends on the jury, and it depends on factors that we don't know yet. But --

THE COURT: Is there any sense right now, any filing, any argument, anything before the New York judge with respect to a continuance of that March -- late March trial start date?

MR. BLANCHE: I would be -- we are going to ask for more time every time we're in front of that judge. So we are -- we are not aware of any -- we are not aware of anything right now other than what has already publicly been argued by us, that we need more time, given what the Court did in that

case with respect to the D.C. trial. And, you know, well -- so, no, we don't have any reason to believe, but I don't want to represent anything other than, to this Court, than we are most certainly in a position where we want more time, and -- but to this point, Judge Merchan has denied our application.

THE COURT: Okay.

MR. BLANCHE: And I say that -- there is some meat on that. And we know that the -- the juror -- the jury pool and whatnot have already -- they've already started the process of planning on a jury coming in on the 25th.

THE COURT: So as far as you're aware right now, that is a firm date.

MR. BLANCHE: Absolutely -- 100 percent, yes, Your Honor.

THE COURT: All right. Anything else on, sort of, big picture scheduling?

MR. BLANCHE: No, Your Honor. Just, I'm happy to answer any questions that come up in response to what I have said now. I would just say again that I think maybe it was lost in our submission because of all of the dates we put in between now and mid August. We did that to answer the Court's direction. We think the calendar is -- is much more appropriate and easier to fill if the Court schedules this trial after -- after the election, and certainly object to a trial in -- I mean, at the risk of saying the obvious, any

later [sic] than what we proposed. Because it just comes -- it's just completely unfair to President Trump, to, you know -- who, for all intents and purposes, is a -- the Republican nominee for president of the United States.

THE COURT: All right. Thank you.

Let me hear now from any other defense attorney who wishes to be heard on the issues of scheduling. Then we will shift to the motion to compel discussion. I may need to hear again from the government on that topic. Then, hopefully, we are still on track for our recess and then legal argument in the afternoon.

MR. WOODWARD: Thank you, Your Honor.

I want to touch upon a couple of issues that are unique to Mr. Nauta with respect to scheduling. I think probably the best place to start is the status of discovery in this case because from our perspective, we're not -- we're not finished with discovery. We are going to talk about motions to compel separately. We appreciate that the Special Counsel's position is that we don't have any standing in discovery, but the reality is that regardless of how the Court rules on those motions to compel, discovery continues to come forward in this case. And as we indicated in our filing this morning, we learned just yesterday that there is a search warrant that hasn't been provided to us yet. Now --

THE COURT: That's a search warrant for what, as far as

you're aware?

MR. WOODWARD: It's a search warrant, as I understand it, for Mr. Nauta's iCloud account. And so what happens, if you use an iPhone with an iCloud backup feature, is that your iPhone is constantly backing up to the cloud. And so what the FBI can do, even in the absence of having the physical device, is they can get and execute a search warrant on Apple for the backup of that phone that is stored in the cloud.

Now, there is some data that is only stored on your phone, typically that's going to be pictures, but there is quite a bit of data that is both stored on your phone and in the cloud. If you lose your phone, as many of us have done, I have done multiple times, you get a new phone, you put in your information and you download that backup and it looks exactly as it did the day before. And so that's not an uncommon means that the FBI utilizes to collect data.

Now, to be sure, we have the data that they collected, but we don't have the warrant. Now, I don't suggest that that --

THE COURT: Do you have the application in support of the warrant?

MR. WOODWARD: We do not. What the Special Counsel's office made me aware of is that there is a public version of the application in support of the warrant that is available. I was not previously aware that the Press Coalition had been

litigating the publication of Mr. Nauta's warrants.

THE COURT: Could you have been aware?

MR. WOODWARD: I suppose I could have been following every matter that was docketed in this district to see which ones involved Mr. Nauta. But certainly nobody from the Special Counsel's office nor the Press Coalition asked for our position on what should be public and not public with respect to his -- the applications for search warrants of his devices.

I don't know that there was any legal obligation for them to do so. It would seem, as a matter of courtesy, that somebody in the Justice Department would let us know. But, no, we had no idea that there was all this litigation happening in the Southern District about the applications that involved, you know, specific details of Mr. Nauta's life that are being published on the docket.

THE COURT: And you just learned that yesterday.

MR. WOODWARD: No. The first time I learned that was in a meet and confer -- I can't recall whether it was Monday or Tuesday or last Friday -- in which the Special Counsel asked our position -- as the Court is aware, one of the motions we filed was a motion to suppress the result or the -- the material that was obtained through the execution of warrants on Mr. Nauta's devices. We attached those motions to -- we attached those warrants and the applications, therefore, to our motion. And the Special Counsel's ask of us was: Would you

all be willing to simply refer to the public facing versions of those applications? And my response was I had no idea that they existed.

So that was -- I can't recall when that meet and confer was, Your Honor. I think it was Monday afternoon.

THE COURT: Within -- fairly recently.

MR. WOODWARD: Yes, Your Honor. Yes.

THE COURT: Okay. So I guess your point, though, broadly speaking on discovery, because there was additional time afforded in the scheduling order for defense counsel to review both unclassified and classified discovery is what?

MR. WOODWARD: We're not finished with discovery yet. And so we're setting --

THE COURT: Can you provide more specificity? Because I understand it's not out of the ordinary for the government to provide additional discovery within reason in anticipation of a trial date as it becomes available to them. And so, in your view, is what's happening now somehow out of the ordinary with respect to these continuous transmissions of discovery? How is it that discovery in your mind is becoming, from what I am hearing, not done?

MR. WOODWARD: Oh, not at all out of the ordinary. I mean, I think in any normal case Your Honor certainly appreciates that as the government becomes aware of additional discovery, they make it available to defense counsel. What is

out of the ordinary is the -- a truncated approach that the Special Counsel is seeking in this case.

Let's transition to the CIPA 5 discussion that we have had this morning. In CIPA 5, we are tasked with advising Your Honor of every classified document or classified information that we intend to rely on at trial. And the Special Counsel, we know, wants to hold us to that disclosure. And so in less than a month's time the Special Counsel would like us to tell you exactly which classified information or classified documents we intend to rely on in defense of Mr. Nauta.

THE COURT: Why is that untenable?

MR. WOODWARD: The problem we have, Your Honor, is threefold. First, Your Honor ruled, I believe this week, that Mr. Nauta himself would not have access to that classified information. So be it. But the Special Counsel made two concessions in their application which Your Honor unsealed earlier this week; that would be ECF Number 349. The first concession they make is that Mr. Nauta will have access to any classified markings that were in the boxes of documents. Well, we don't have that; right? I suppose they propose to redact the documents of all material or all content except the classified markings? We don't have that yet. I mean, that is discovery in this case. Mr. Nauta cannot --

THE COURT: So what are you talking about? The face

sheet of the document where it says "top secret" or whatever it says?

MR. WOODWARD: Oh, I expect that what they're going to do -- and they can correct me on this -- but if there is a document bearing the classified marking, a document that he is alleged to have conspired to conceal, then they're going to redact the classified information from that document and Mr. Nauta gets everything but the classified information.

So, to be sure, not every document that was in a box has a classified face sheet. In fact, I think the vast majority of those documents do not. What they have are classification markings. And what the Special Counsel advises the Court is, that's all that Mr. Nauta is entitled to see, that's all that is material to Mr. Nauta's defense.

Now, we disagree with that and we're not here to litigate that or relitigate that, but he -- they can see he gets access to that, and he doesn't have it yet; right? Now what they will probably tell you is that I am a sophisticated counsel and I'm perfectly capable of describing to my client -- describing to my client what those classification markings look like.

In their previously sealed and ex-parte submission, they say that the documents in question are identified in the indictment itself, that I can go and I can look at those 32 classification markings that are identified in the indictment

and I can discuss that with Mr. Nauta. But that divorces what is really happening here from a legal concept. What is really happening here is that we have boxes full of documents, some of which allegedly bear classification markings and that apparently Mr. Nauta was supposed to have been privy to because he was hiding those boxes or concealing those boxes from either President Trump's counsel or from the FBI or from the grand jury. And it doesn't matter, the Special Counsel would say, what the content of the document was; all that matters is that they had a classification marking.

THE COURT: Okay.

MR. WOODWARD: But I need to be able to review with Mr. Nauta the contents of those boxes so that I can understand.

THE COURT: Do you mean the contents of the markings?

MR. WOODWARD: I need to know the content of the boxes. So there is a box that --

THE COURT: But those have been available for some time, have they not?

MR. WOODWARD: Except they don't have the documents with the classification markings.

THE COURT: So what is it that you at this point don't have that you believe you are entitled to consistent with the Court's Section 4 order?

MR. WOODWARD: Consistent with the Court's Section 4 order, the government is going to -- is -- agrees that

Mr. Nauta may receive -- may review the classification markings, so the documents with classification markings, but not the classified material on those documents.

Now, I suspect --

THE COURT: And how would this -- so I -- conceivably, you would have an entirely redacted document with a marking on the bottom right, let's say, and so -- help me understand why it is that that is -- is important to your consultations, without revealing any attorney-client privilege, of course.

MR. WOODWARD: I will answer that in two ways. First of all, if it's discovery, it's important; right? I don't think that we're in the business of parsing out which discovery is important to Mr. Nauta and which is not. That's not what Rule 16 or Brady contemplate. And so they've said he is entitled to it. We don't have it. And so that's problematic.

Second of all, what the government is going to have to prove at trial, and there is a debate about this, but that Mr. Nauta understood that the boxes he was moving contained classified information which is why he was moving them. And the only way for him to have known that is, A, for the government to prove that someone told him that, but there is no allegation that that happened; or, B, that he was aware of the classification markings. In fact, the indictment makes hay of the fact that there is a spill box with a document that bears a classification marking.

Now, I've looked at that document as closely as I possibly can. It's -- it's going to be incredibly difficult for them to convince anyone that Mr. Nauta or anyone else knew that there was a classified document in that box. But that's the theory of their case; that there are all these documents, bearing classification markings --

THE COURT: Is that the photograph that I think is in the indictment?

MR. WOODWARD: It is. A redacted version of that photograph is in the indictment. They redact -- I can't recall whether they redacted a classification marking or information that is classified, but that is the photograph that is in -- in the indictment. And that, in spilling that box and seeing that document amongst the thousands of pages of papers in that box, Mr. Nauta must have understood that the boxes contained classified documents. And then when he moved them, he must have understood that what he was doing was hiding documents bearing classification markings.

And so what I think I should be permitted to do is sit with Mr. Nauta and review the contents of those boxes, including the documents as they existed in the box with the classification marking, albeit, at this moment in time, with the classified information redacted from it, so that I can speak to him about: Mr. Nauta, what did you understand? What should our defense at trial be? Should we be cross-examining

FBI agents on the contents of these boxes? Should you testify about your understanding of the contents of those boxes?

The second concession the Special Counsel makes in their previously ex-parte submission is that Mr. Nauta will be entitled to the evidence that is admissible against him at trial. But we don't know what that is. And that sort of is -- it sort of brings back to light all of this discussion about what redactions are going to be necessary. The Special Counsel has not told us, through Section 6, what the evidence at trial is going to be. But once we have that information, we will be in a much better posture to discuss with Mr. Nauta what we need from the Court vis-á-vis his access to the documents. If they're simply going to --

THE COURT: Are you saying that you think Section 6A should come before Section 5? I'm a little bit confused.

MR. WOODWARD: So one thing I will observe about Section 5 is that what Section 5 provides -- I understand Special Counsel wants us to get at Section 5 now. But if you read the plain language of Section 5, it contemplates a submission 30 days before trial. The literal language of the statute says: When the Court orders, or, at the latest, 30 days before trial. There is nothing -- to answer your question, Your Honor, yes, there is nothing in Section 5 or Section 6 that specifies the timeline. Now --

THE COURT: Right. But it would make logical sense to

proceed through CIPA in a sequential way, just like the statute is organized.

MR. WOODWARD: Absolutely. And I'm sure the Special Counsel will advise you that that is how it is always done. But we have a unique case in the circumstances. We have a case in which Mr. Nauta is not permitted to understand the content of the documents. At this juncture, they're asking us to identify which documents we want to use at trial now, but only later are they going to tell us which documents they're going to use at trial.

So I'm tasked with predicting which documents they're going to use at trial so that I can identify the evidence that we intend to use --

THE COURT: Are you aware of any format that has permitted, like, a follow-up Section 5, post-disclosure of government's Section 6? In other words, some mechanism that would permit the defense to then maybe supplement the Section 5, having received what they see in the Section 6, if that makes any sense?

MR. WOODWARD: No, not in those precise terms. Although Section 5 does contemplate supplemental submissions. My concern here is that the Special Counsel is going to jump all over that and say they could have and should have identified records in March that they intended to use at trial. They've had 5,300 pages or 6,300 pages of discovery now for

months and months and months. Why didn't Mr. Woodward identify Document ABC in his March submission? Now, only after we have given him our trial exhibits, he is identifying Document ABC; it's too late.

THE COURT: I think that does speak to a broader point which is, you know, this proceeding, as CIPA hearings I think broadly go, evolve, and they present issues as they do, and it's hard to predict with precision exactly what will be necessary at each of those stages because much depends on court rulings and physical review of documents. So there needs to be some -- some space in the schedule to allow for that flexibility and to allow the Court to have enough time to sort through those issues. So I do take your point as a fair one on that basis.

Anything else that you want to tell me about discovery specifically, because that's where you started.

MR. WOODWARD: Not that is unrelated to the motions to compel.

THE COURT: Okay.

MR. WOODWARD: So we have --

THE COURT: And just so I understand, as far as the proposal that was offered, I see you have a September 9th; is that correct?

MR. WOODWARD: That is -- so, yes. That is, we think, the soonest that we could possibly be prepared for trial.

To be sure, I don't think that we will be ready for trial. I mean, it is conceivable that Your Honor will deny all of the 20 motions that are pending as soon as briefing is complete. But, you know, we -- we think that you will rightfully take the time to consider those.

You know, we -- you know, Mr. Bratt made the offhanded comment about the fact that I have noted a vacation in the scheduling order. I don't do that lightly. This is a case of national importance, but the reality is, is that we are all people too. I have four young children, 8, 6, 4, and 2. We made our childcare arrangements this summer around when that vacation would be. I'm not going to -- I don't --

THE COURT: I understand that. And there is a human element to scheduling always, and I'm well aware of that. So --

MR. WOODWARD: So that's why we did that, Your Honor.

We think that, you know, as we have collaborated with our defense counsel in putting forth hearing dates, we just -- here we are. I mean, it's -- we have been at this for 82 minutes and we are just talking about scheduling. There are some really complicated legal questions, some of which Your Honor will be deciding for the first time. And if this case is as important as the Special Counsel says, then it deserves the time and attention for the Court to rule on it in a reasoned manner. And so even if we lose every motion that

we've brought, and in criminal cases you often do, it takes time to do that. And so we don't think that rushing to judgment here is appropriate.

THE COURT: All right. Thank you.

Anything from counsel for Mr. De Oliveira?

MR. IRVING: No, Your Honor. Thank you.

THE COURT: Okay. Then let me hear from Mr. Bove on the motion to compel issue, specifically I would like for you to isolate the particular degree of fact-finding that you think is necessary, focusing in on the prosecution team question and helping me better understand sort of the logical sequence for addressing that motion.

MR. BOVE: Yes, Judge. Thank you. Good morning.

Just at the outset, the reason that this prosecution team motion is important is that it has a cascading effect on the government's discovery obligations for the rest of the case. And Your Honor referenced case file reviews when you were talking to Mr. Blanche. And that is the correct frame of reference. Because when this case started, I wasn't here, but I have read about it last summer, and the government said we are going to go above and beyond Jencks. We are certainly going to comply with Giglio. Brady, no question, obviously we're going to do that. And we're going to do it promptly, immediately, day 1.

The only reason that they could stand up in court and

say that out loud was by defining the prosecution team in a completely untenable and unlawful way.

They -- they have stepped back from those representations and, really, never defended them since they said them. But --

THE COURT: What do you mean the representation? About who was working on this case, that definition?

MR. BOVE: The representations about compliance with Jencks on day 1.

THE COURT: Oh, okay.

MR. BOVE: Because now we understand that, at the very least, there are outstanding emails from agents they concede are a part of the prosecution team. And so that -- that is the reason that we're so focused on that motion. Because independently of all of the other parts of the motion to compel -- and I would like to talk about those if we have time today -- what the government is saying is when it's time for us to represent that we're in compliance with Jencks, we are going to say we're compliance with Jencks with respect to the three FBI agents from the Washington field office.

When they call a witness from, for example, NARA, they're going to say we don't have a Jencks obligation with respect to that witness; maybe they will turn some things over voluntarily, but it's not our problem. When they put on a witness with respect to the NDI element, they're going to say

we don't have an obligation to go to the CIA and collect exculpatory information about whether the classified information is closely held; they're not a part of the prosecution team.

And so that's why I say this prosecution team motion is queued up because it impacts the rest of the case.

THE COURT: Well, they say you're not entitled to a hearing on the prosecution team question, that there is no fact-finding to be done. What is your response to that argument?

MR. BOVE: We have set forth direct -- more than plausible arguments about the composition of the prosecution team in this case, ranging from DOJ leadership, to FBI leadership, to the Intelligence Community, to NARA, and to the White House. But it's not all talk. We have attached exhibits to these motions that lay out the factual basis for our theory. And I think any litigation, Judge, and especially in a criminal case with the consequences that this one could have, it is incumbent on the government to do more than submit an unsworn brief and tell Your Honor to take our word for it. And that's all they've done.

And you have referenced today the litigation relating to the search warrant in Trump vs. United States and the things that were said about the Intelligence Community in that setting. That's one immediate and, I think, obvious part of

the factual dispute between the parties about what happened on the ground that supports President Trump's argument and the defendants' argument that the IC is a part of the Intelligence Community. The answer to that is because the government said so.

And they -- they speak vaguely about their representations in those briefs. But one of those briefs included a declaration from Assistant Director Kohler of the FBI on this topic. So it's not even as if this was all talk from DOJ lawyers defending that search warrant in 2022. This is evidentiary support from the back table that they're on the team.

THE COURT: Okay. You could appreciate that the request that you make with respect to how broad, with the many, many agencies.

Taking a functional approach to the prosecution team on a case-by-case basis, what would be your view about -- about a prosecution team analysis that is just more tailored to the actual people that, arguably, again, not knowing the full scope of evidence, worked on these decisions at -- or at least extensively collaborated with the Special Counsel and when.

MR. BOVE: I think that that is the approach that is required by the 11th Circuit in the 5th Circuit law that we have cited. And when we say, for example, that we believe NARA is a part of the prosecution team, we're not suggesting or

intending to suggest that the Special Counsel's office needs to go search the emails of NARA personnel who did not participate in the collection of the 15 boxes. But there are some NARA personnel, including their general counsel, including the former archivist who absolutely participated. And, yes, they're a part of the prosecution team. And the government --

THE COURT: How do you define just temporally -- when does the analysis of investigation begin?

MR. BOVE: As soon as -- as soon as the agency that drove the referral contemplated criminal prosecution. And in this case that is September of 2021 when NARA sent the internal email that is attached to our unclassified brief at Exhibit 5 that said they had informally contacted DOJ. We have a factual dispute about the substance of that contact. Our position is that that contact was the initial outreach that initiated contemplation of criminal charges, and that that was totally inappropriate under the standards and practices and history of that agency, and it was done so in a completely biased and unlawful way.

THE COURT: And you submit that took place in what time frame?

MR. BOVE: It's a September 1st, 2021, email referring to informal contact with DOJ; that's Exhibit 5 to our unclassified brief. And so that's our position. There is, at minimum, a factual dispute. And the government has not

explained it. They certainly haven't put forth evidence that could put different content than we have ascribed to that email.

THE COURT: So if you were to conceive of a hearing in your view -- again, these are issues for me to assess more carefully -- how would you envision an evidentiary hearing on the prosecution team question developing?

MR. BOVE: We would offer into evidence at that hearing the exhibits that we have attached to our brief, and then we would elicit -- we -- first and foremost, because -- we have raised colorable issues on the scope of the prosecution team. It's the government's obligation in this case, it's the government's ethical obligation to establish that they are in compliance with their discovery obligations. So at that hearing the burden is on them. But I would expect that, in order to meet that burden --

THE COURT: At this point have you received any information that would counter or rebut the allegations or arguments you make in the motion?

MR. BOVE: It's all talk, Judge. It's their brief. I can write a brief. They can write a brief. Ours has exhibits. It has exhibits that are contemporaneous with what happened. And they're not just from the discovery. And I think that's an important point. We shouldn't have had to, but we did, go to FOIA releases to dig to find these details that they have

hidden from President Trump about how this initiated, and that it would be a part of our showing at the hearing. But it would require witness testimony.

THE COURT: Quick question on the FOIA stuff.

Do you -- I attempted to figure out whether any of the material that is subject to redaction is coming from the FOIA documents. I think the answer is no, but do you -- can you clarify whether -- whether the Special Counsel is seeking redaction or sealing of any items in the FOIA as far as you can tell.

MR. BOVE: I do not believe that they are seeking redaction of exhibits that are FOIA released, but they are seeking redaction of information from other exhibits that is duplicative of information in FOIA releases such as the names of NARA personnel who participated in --

THE COURT: Well, we will talk about that in the afternoon session. It does get very detailed.

MR. BOVE: Right.

THE COURT: Okay. So sticking on the subject of factual disputes on the prosecution team question, is that just -- so I understand your request, it would be a hearing on the prosecution team question, a decision on that issue, and then, depending upon what you do or do not receive following case file reviews in accordance with that judicially enforced definition, then a motion to compel the various topics, if you

still have those requests live?

MR. BOVE: Our proposal is slightly different, Judge. We have proposed a two-day hearing on March 13th and 14th to address the motion -- the motion to compel in its entirety, and our request for discovery on the selective and vindictive prosecution issue. And as I'm sure Your Honor can appreciate, that selective prosecution issue is so important to this case and to the country, as we stand here with President Trump in the room in a setting where there are public findings that the sitting president of the United States engaged in the same conduct and will not face charges. And so that is why, in our schedule, our proposed schedule, we front loaded that issue. Because it's going to take a lot of work to get to the truth of that and we want it to come out as quickly as possible.

And so we proposed a two-day hearing, like I said, motion to compel and selective prosecution. We think that the motions to compel raise 22 discrete issues. We are seeking an evidentiary hearing with respect to five of them. On that list of five is the prosecution team scope, which I do think is a threshold question.

With respect to the remainder, for which we're not seeking an evidentiary hearing -- when I say hearing what I mean is oral argument on legal questions. I'm going to -- I think it's probably the third time.

Our position is that the government has the burden in

that hearing of demonstrating that they are in compliance with their discovery obligations because we made a plausible showing that they are not.

THE COURT: But that's rooted again on the definition of the prosecution team; correct?

MR. BOVE: No, Your Honor. It's -- in part, but it's also rooted on the material -- materiality standard of Rule 16(a)(1)(E) and on the government's affirmative search obligations under Brady. All of those things lead the government to have the burden of proof at a hearing like that. And so -- if they don't want to call witnesses at that hearing, they're not going to meet their burden. We may still want to call witnesses to get the truth out and to make our points.

Here, if I could list out what I think are some of the key factual disputes --

THE COURT: Yes, please, that would be helpful.

MR. BOVE: -- about the prosecution team.

There is the submissions in Trump vs. United States that we've talked about, and, from an evidentiary perspective, the Kohler declaration. There --

THE COURT: But those are -- those are a matter of public records. So what more needs to be done on that?

MR. BOVE: What did Mr. Kohler mean by that? Because what I heard this morning is he didn't mean what he said, so I think he has got to come here and tell us.

What else? What are the -- is the nature of the access to classified email systems and databases by members of the Special Counsel's office, which I think has just manifest relevance to the scope of the prosecution team. And I'm referring here to Classified Exhibit 7 and Classified Exhibit 8 to our supplement.

THE COURT: I think what I have heard today, which was helpful, was that there is a liaison, I guess a litigation liaison, and maybe that's really just the point of contact, and no -- and no additional access.

MR. BOVE: On that point, Judge, we have a factual dispute about the meetings referenced in the classified briefing that happened -- three meetings in March of 2023, attached as Exhibits 39, 40, and 16 to our classified supplement. And if you look at the participants in those meetings, you will see a cast of characters that sounds very different than what Mr. Bratt said to you this morning.

And there are notes to those reports that they refuse to provide, there are conversations about strategy for how to bring these charges in a way that the Intelligence Community is comfortable with, that bear on prosecution team's scope. And so we would expect that at that hearing, if they're going to meet their burden, they're going to call some witnesses to explain what those reports really mean and how it could possibly be the case that when you sit down with those agencies

and you say, How does this document look? Could we bring a charge based on this? What would it have to look like to get you guys comfortable?

Mr. Bratt referred to a redline this morning. When they sit down in the meeting to draw the redlines about how this case will look, how does that not make them a part of the prosecution team? We're way past the -- any kind of burden, I think, of putting forth evidence that suggests fact-finding is appropriate. We've asked them -- before we filed the motions we said: Can we at least see the notes to these meetings that says there is additional details? We would like to better understand them. Nope, not discoverable. Not happening. Cannot.

Well, now this is where we are, Judge. We're in a place where the Trump vs. United States filings reflect extensive coordinating -- coordination, the reports in discovery reflect that. I just -- I do not think you will get a straight answer to the question of: What is the significance of a meeting where the prosecutor consults the Intelligence Community about whether and to what extent a document can be used in a criminal prosecution?

THE COURT: I think they would say, well, they're victims and they're -- they're equity holders, but that's it. They don't conduct any investigation. And they're not acting as an agent of any kind.

MR. BOVE: We've briefed the victims' issue and it falls apart. But in a meeting where prosecutors sit with agency personnel and talk about litigation strategy -- and that is what it is, litigation strategy, about how to use one of these documents in a prosecution, the agency personnel are much more than victims and they're much more than, respectfully, the FBI agents in the room.

THE COURT: Okay.

MR. BOVE: They are closer to prosecutors, and they're having prosecutorial input on what the presentation of this case would look like to the jury. And that makes them --

THE COURT: All right. I think because of -- in the interest of time -- and some of this is sort of getting into the potential topic for a hearing. So let me just have you run through the additional factual disputes. I think you said you had maybe a list. And then I would like to hear from the Special Counsel on any additional issues related to scheduling for purposes of the motion to compel.

MR. BOVE: So I have talked about the September 1st, 2021, email and -- that references informal contact, NARA's informal contact to DOJ; their September 15th, 2021, email correspondence between NARA and the White House counsel.

And based on the timing of that outreach and the content of it, that also raises questions about what are now the three components, NARA, DOJ, White House counsel,

coordinating in a very -- at a very early time, both with respect to any president who has left office from a NARA standpoint, and relative to what happened in this case, early coordination between those three parts of the government. That email is Unclassified Exhibit 6 that I'm referring to.

Moving forward. January 2022, February 2022. We've provided a number of exhibits, unclassified, the numbers of Exhibits 14 through 18, about the sequencing of the referral and the participants in that process. I truly do not understand how, even today, the government is telling you that that began in February of 2022 when it is obvious from the face of the documents that it happened a month before.

And the significance of that -- it's relevant to the prosecution team argument because it's NARA -- as distinct from NARA-OIG -- NARA coordinating with the prosecutors to drum up a criminal -- a paper to file with a criminal referral so that all of this could look nice and tidy when they decided to publicize it, and they could try and hide behind the NARA-OIG referral to not let us get at what actually happened in this case.

But it's also relevant, as we've laid out in our motions, to the Franks suppression issue. It's relevant to the due process violation under the Supreme Court cases in Cordell and La Salle. So the issue around this referral, it touches on a number of motions --

THE COURT: Okay. That's okay. Any other factual disputes?

MR. BOVE: Yes, Judge.

One of the government's responses to our discovery letters refers to a classification review process that appears to have been separate and distinct from the one they've disclosed in discovery. We've raised this in our classified briefing. I think that's at Classified Exhibit 21, page 6. And so I raise that as a factual dispute because the nature of the classification reviews is critical to the analysis of whether the IC was a part of the prosecution team. I really don't think that's a close question, but if they want to continue to contest it, then they've got to be clear about what happened during these reviews.

What we see from the discovery is a process run through FBI Headquarters, not the Washington field office, not the Miami field division, run through FBI Headquarters with the Office of the Director of National Intelligence tasking agencies.

So they want to talk about authority as the lodestar of what "prosecution team" means. The FBI and ODNI are sending out taskings to these agencies. And each time that the government has sort of fixated on that word "authority" in this litigation with respect to prosecution team scope, I do wonder a little bit about whether the FBI agents who are on the

prosecution team, whether the -- whether even the FBI director feels like Jack Smith has authority over him. That falls apart, Judge. It doesn't make any sense. I'm pretty sure that the FBI director would say that they collaborate. And they concede that the FBI is a part of the prosecution team.

There is evidence bearing on prosecution team scope that NARA participated in the classification review process. This is our classified supplement at page 2, and the exhibit is Classified Exhibit 5.

And then there is a recent -- a more recent development that we were very surprised by at the last classified hearing. There is a White House component -- I'm going to speak at a high level here. There is a White House component that the government has taken the position is not a part of the prosecution team. That component was the subject of a memo that is a part of the classified discovery; that's Classified Exhibit 31. And the import of that memo is that the component did not participate in the classified -- the classification reviews.

And so we were very surprised to be sitting in the SCIF with Your Honor at the second day of the hearing and hear the Special Counsel's office talk about communicating with that very same component about classification reviews. And that is at the -- I'm talking about the February 13th, 2024, hearing, page 32, line 9 of the transcript, and page 40 at lines 14 and

15. And so there is certain -- most certainly a factual dispute about that component's role in the initial classification reviews and then whatever they're telling Your Honor about classification reviews and ex-parte proceedings today under the Section 4.

THE COURT: Okay.

MR. BOVE: And so that's a rundown. And it does sort of break out between their factual disputes requiring evidence on the unclassified side of this case and on the -- on the IC side.

THE COURT: In terms of the hearing potentially on the motion to compel prosecution team issue, do you -- how would you -- seeing as it's going to potentially involve classified information, what are your thoughts on just scheduling and format?

MR. BOVE: First and foremost, it's their burden if Your Honor orders a hearing. I do assume, though, that with respect to the Intelligence Community's role on the prosecution team, if they were going to contest that in any serious way with something more than the unsworn briefs and representations from the podium, that they've brought so far, that that would have to happen in the SCIF.

THE COURT: Okay. All right. Thank you.

Let me hear from Special Counsel on the issues for scheduling as connected to the motion to compel. And then we

will, as promised, break for about an hour and shift gears to hear argument on the sealing/redaction issues.

Mr. Harbach or Mr. Bratt.

MR. BRATT: So I will address the remaining scheduling issues, Your Honor. Actually, I forgot one thing.

And then, if I may just respond briefly to a couple of the points that Mr. Blanche and Mr. Woodward made. On the scheduling issues, just on the unclassified side, one other thing about the expert notice. They have us filing our supplemental expert notice before they file their expert notice? That doesn't seem to make a lot of sense. Because oftentimes the supplemental notice is responding to something that is in their notice. They also --

THE COURT: Wait. Can you point me specifically to docket 357 and identify the inconsistency or issue?

MR. BRATT: Yes, one moment, Your Honor.

On July 8th, they have the government filing, its Rule 16, supplemental expert disclosures. And they have theirs on July 15th, I believe. Yes, expert disclosures on July 15th.

THE COURT: So what is the issue?

MR. BRATT: The issue is usually the supplemental expert notices are how our expert is going to be responding to something their expert might be saying. So it is not logical to have our supplemental come before they file their notice.

THE COURT: What if there were another spot for a, kind

of, final supplemental expert disclosure on the part of the government?

MR. BRATT: I mean, I guess, you know, we will --

THE COURT: Okay.

MR. BRATT: I mean, it's possible something could come up in one of the hearings where we would say, all right, we need to expand something the experts are going to say. I don't think so, but --

THE COURT: Okay.

MR. BRATT: Sure.

THE COURT: All right. Any other specific scheduling issues?

MR. BRATT: Yes. The only other one is that they request that there be supplemental filings on the questionnaire on July 1st. And, even if we take their August 12th date, that's within the 10 weeks that the clerk's office would have -- would need to get questionnaires out. So the discussions and the -- finalizing the questionnaires is going to have to come, I think, well before July 1st.

THE COURT: I was curious about that. So how did you come up with that 10-week -- did a member of your staff call the clerk's office to figure out what the timeline was?

MR. BRATT: Your Honor, you may recall in the motion that we filed to ask for the parties doing the questionnaire, we cited some of the minute entries and also some orders that

other judges in this district had done. And at least a couple of them say that the judges themselves had checked with the clerk's office, and the clerk's office had told -- I forget which other judge it was or judges -- that they need about 10 weeks. It's in our pleading, Your Honor.

THE COURT: Okay. All right.

Now, I did want to raise -- there has been some emphasis in the papers on the Justice Department Manual, Chapter 9, 85.500. I did want to give you an opportunity to state your view on that. I didn't see it, really, memorialized in the papers thus far from your end.

MR. BRATT: So, Your Honor, we are in full compliance with the Justice Manual. And we actually did a consult with the public integrity section which oversees that portion of the Justice Manual. And that provision does not apply to cases that have already been charged, that are being litigated. It doesn't apply to setting a trial date. We are fully in compliance. We have two former chiefs of the Public Integrity Section as part of the -- part of Special Counsel's office, and we are -- would not do something that violated the -- the Justice Manual.

THE COURT: Okay. So just so I understand, that provision, as you have explained it to me, does not affect already-indicted matters --

MR. BRATT: Correct.

THE COURT: -- is that what you are saying?

MR. BRATT: The Department can control what we do before a case is filed and tell us -- they can tell prosecutors don't file an indictment or don't seek a complaint. It's called the 60-day rule that really is --

THE COURT: But you see that 60-day rule as key to the date of indictment, not the date of trial?

MR. BRATT: It is where we have control of something and we can bring a new case within whatever period of time before an election. It does not apply to cases that have already been charged.

THE COURT: Okay. Thank you for explaining that position.

Okay. Anything further on scheduling?

MR. BRATT: Not on scheduling, Your Honor.

THE COURT: Okay. Then let me hear from Mr. Harbach if he has any --

MR. BRATT: Could I just -- just respond briefly to a couple of points that --

THE COURT: Oh, yes. Sorry. I thought you were taking the scheduling piece and he was doing more motion to compel hearing, sort of, argument.

MR. BRATT: Right. But there were some things that both Mr. Blanche and Mr. Woodward said that I would like to give a response to.

THE COURT: Okay, okay.

MR. BRATT: One, Mr. Blanche was expressing some shock over the fact that we wouldn't think -- that we wouldn't know that we might want to litigate the Section 5. I will just tell the Court that I saw their notice in the election case, and it was woefully inadequate. I mean, it sought things that had not even been produced in discovery. It was noticing things that were in -- somewhere in the Intelligence Community's realm. And that's why our colleagues in that case filed their motion to strike.

We have every expectation, knowing, again, Mr. Bove and his experience, that the Court -- that they would -- in this case they will file a sufficient -- a sufficient notice. So we don't expect there to be litigation. We certainly don't want there to be.

With respect to the issue of the search warrant that Mr. Woodward mentioned -- so there were two iCloud search warrants. They are virtually identical. We did produce one of the iCloud search warrants. We -- turned out, there was some lapse. The second one didn't. But it's now being produced to him. And he already had the returns from that iCloud warrant. So it is not -- it's not something that is new information. It's just -- it's just the affidavit.

THE COURT: Oh, okay. So you're saying there were two warrants for iCloud accounts --

MR. BRATT: Correct.

THE COURT: -- associated with Mr. Nauta?

MR. BRATT: Correct.

THE COURT: And the substance of the return has already been provided to him?

MR. BRATT: That is correct, yes.

THE COURT: So all that is left is the affidavit?

MR. BRATT: Correct.

And I won't take any time responding to what we need or not need to prove about what Mr. Nauta knew was in the boxes. I think Mr. Harbach covered that very extensively in the last hearing. But with respect to the boxes -- first of all, Your Honor's order is just a few days old, but we can work with Mr. Woodward to -- and Mr. Irving for a way -- for their clients to see the --

THE COURT: The markings.

MR. BRATT: -- the markings on the headers and footers of the documents, yes, we can do that.

But the other thing I should also say is, the boxes have always been available for defense review. That was in our first discovery letter to all defendants. Now, as I think I explained, the actual classified documents were pulled out and are stored elsewhere, but there are markers as to where they're found. All they need to do is reach out to us and we can arrange a time for them to view the boxes.

Last, Your Honor, you know, both Mr. Blanche and Mr. Woodward made essentially the same argument, which is that: Well, August 12th is what we're proposing. September 9th is what we're proposing. But, really, Your Honor, we're not going to make that. We're going to be asking for continued extensions of time, adjournments of the trial date. And then --

THE COURT: Well, I think what he was talking about was the New York case.

MR. BRATT: Again, what I heard, Your Honor -- obviously, you know, I rely -- but they were saying they don't think they can even get to trial on the dates that they have proposed.

And that then leads to the question: Why did they propose those dates? Because what it really seems to mean is that those were fake dates. They were really almost bad faith dates. That if a trial is set in this case in August or, even more, in September, and if the mandate returns to the D.C. case, this case would then stand in the way of it. But their intention is to try to adjourn this case again. And we just need to bring this case to trial this summer.

THE COURT: All right. There is a lot of business before the Court; that is, I think, without a doubt unquestionable based on a glance at the docket and not to include the many in camera temporarily-filed pretrial motions.

So I think that is evident. And a lot of work remains to be done in the pretrial phase of this case, which, of course, needs to be done properly and correctly, as I'm sure everybody in this room would agree.

So with that, anything further from the Special Counsel on issues relating to scheduling/logistics?

And, Mr. Blanche, if you have a particular thing you need to say, then I will give you a chance --

MR. BLANCHE: Thank you, Your Honor.

THE COURT: -- at the end. But I do want to try to wrap up at least as close to noon as possible.

MR. BRATT: I will turn it over to Mr. Harbach now.

THE COURT: Okay.

MR. HARBACH: Thank you, Your Honor.

I'm going to -- I will try and be brief. I would like to start where Mr. Bove started. When Your Honor asked him about the reason for their request for having a hearing on the scope of the prosecution team, what he said was it would have cascading implications for the government's discovery obligations. That was the first thing he said. That would be true in any case, in any case in which, theoretically, the government -- the scope of the prosecution team could be expanded at the outset, of course, it's going to have cascading obligations. That's not a real reason.

Second, he said that there were outstanding materials,

in their view, that they haven't received yet or that the government hasn't produced. That's why there is a motion to compel pending. And that's why Your Honor is going to have to resolve those questions. That's not a real reason. I have told you what we think the real reason is and I won't reiterate it here.

One more thing. Mr. Bove expressed his concern that when it came time, as we got closer to trial, that the government might take the position that we don't have to produce Jencks materials for a certain witness because that witness's employing agency isn't part of the prosecution team, or that we don't have a Jencks obligation as to those things.

We know exactly what our Jencks obligations are, and we have complied with them and we will continue to do so. This is the key point. They don't get to go behind that. They don't get to. They don't get to go behind those decisions. They characterize it as: Well, we just have to take the government's word for it for any representations when it comes to discovery.

But show me the case. They haven't given you one. We haven't seen one. We have Saab Moran. We have Armstrong. Show me the case that says they get an evidentiary hearing in any circumstance about what the scope of the prosecution team is. We don't think there is such a case. We see no authority for it, and they certainly haven't cited one.

And when you take into account what I have said earlier today, and won't reiterate, about the real reasons for this, that's why -- that's why Armstrong is implicated, and that's why we think this is just an end run about that.

To Your Honor's question about -- that you put to Mr. Bove about, why would a more tailored approach be appropriate here? Our respectful response to that is, that is no answer. That is no answer to there being no authority for having such a hearing in the first place. Even were it hypothetically limited, as I think maybe Your Honor was suggesting to, you know, only a couple of agencies or something like that. There is no authority for the hearing that they want.

THE COURT: So you don't think there are any factual disputes that are pertinent to deciding the prosecution team question?

MR. HARBACH: I'm going to get to that in just a second. It may -- it may please you to know that I am -- I don't have a response for every single one that Mr. Bove made, but I do want to make a few observations about those. But before I do that, another thing that came out of Mr. Bove's mouth was that they have quote -- I think I'm quoting now -- raised colorable issues. That is nowhere close to the standard for getting a hearing under the authorities that we've cited to Your Honor. And they cite no case saying that's the

standard for this type of hearing in these circumstances on the factual disputes.

Let's talk about a few of those. Many of them -- give me just a second, please.

Okay. I think the first point I want to make is that with respect to several of these alleged factual issues -- when Your Honor asked Mr. Bove to recite them, what he really recited to you were just exhibits to their motion. Look at this email. Look at this email. Look at this email.

First, we produced the vast majority of these emails that they're pointing to, to them, in discovery. And I will remind you, this is in a context of a motion to compel. So the evidence that they're trying to use to extract a hearing, to say that we haven't complied with our discovery obligations, involves stuff that we've already given them.

THE COURT: Right. But they read those materials, and they draw inferences that maybe you don't --

MR. HARBACH: Bingo.

THE COURT: -- of course, right?

And then they view those materials as supporting their definition of a broader prosecution team than the one you've offered which is -- it does appear to be narrower than potentially warranted.

MR. HARBACH: I hear you. And I hope I'm going to answer this concern that Your Honor has.

When they say -- when they're saying things like with respect to the Kohler declaration, what did he mean? That's not a fact issue. That's an inference. That's an argument. But saying "I don't know what somebody meant" or saying "I think so-and-so is lying," that doesn't -- that doesn't create a fact issue. What creates a fact issue is -- in this context I don't want to overstate it -- but what you would need is, even in the best of circumstances, even were there a case authorizing a hearing like this on such a showing, at a minimum you would have to point to evidence that demonstrates that such and such is a lie. And -- and speculation -- we make this point in our brief, so I won't belabor it. But drawing inferences and stitching together argument does not a -- does not a factual issue make.

Let me -- let me give you a couple of examples, and then I think I'm going to sit down.

Let's talk about the March 2023 meetings. Mr. Bove said we have questions about that hearing. That's not -- that doesn't make a fact issue. That you have questions about what happened at the hearing, that you want to know more about what happened at the hearing beyond the generous discovery that the government has already given you about what happened there. That doesn't mean there is a fact issue there. That they think that there -- that they would like there to be a different interpretation or explanation for what happened at that meeting

doesn't mean there is a fact issue.

He mentioned redlines. Let's get concrete for a second. He mentioned that there were redlines. And he expressed some exasperation that the fact that an agency like the CIA or any of these other intelligence agencies would draw redlines, meaning: No, government, you can't use this under any circumstances, I don't care what the case is. He -- he said -- maybe I misinterpreted it -- but he said he didn't understand how that didn't -- that didn't mean that they're a part of the prosecution team. It's just the opposite. It's just the opposite.

When an agency like that says, "Forget it. No way. No how. You ain't using that," that's just the opposite. That means they're not part of the prosecution team.

Second --

THE COURT: Even if they're working in a negotiation-type capacity?

MR. HARBACH: Okay. Your Honor just mentioned negotiation. There was --

THE COURT: I think I have heard that descriptor used which is why I raised it.

MR. HARBACH: I wasn't suggesting it was a mischaracterization. I'm just pointing out that there is -- there is that word. There has also been the word, I think, "collaboration" thrown around or "connection."

And, of course, in cases in which the government is -- has prosecution -- sorry -- is conducting an investigation, they have occasion to coordinate with, have connections with --

THE COURT: Right.

MR. HARBACH: -- have meetings with.

And if you want to talk about, like, negotiation, I don't know whether that's a fairer -- a fairer descriptor or not, but let's assume it is. We're not -- that's not the standard. That's not the standard of whether something is -- is -- some entity is within the scope of the prosecution team.

Take the example they gave about access to databases by members of the Special Counsel's office. That -- that's plainly just a stalking horse for the type of Armstrong hearing that we have been talking about all morning.

Here is another one. The -- when the FBI -- when FBI agents make taskings or requests to other agencies. That happens all the time. Of course, the FBI has occasion to interact with, you know, a victim agency or some other -- some other portion of government. That happens all the time. That doesn't -- that does not mean that those -- all those other agencies within the FBI interacts are automatically part of the prosecution team.

And then the last example, happily; the FBI director example. Now, this is just a classic bootstrapping argument.

I think their argument is that because the government says that agents from the FBI Washington field office, office in this district, are part of the case -- sorry -- part of the prosecution team, that that means that -- that that is a concession that they're under our control. Okay. It may well be.

But to say that because we don't control Christopher Ray means that that is the wrong test? Or that that's not -- that that somehow means that our representation about why the FBI is part of the prosecution team is wrong or disingenuous. It doesn't make any sense at all. It's a bootstrapping argument.

I think I'm finished, but I think that I'm going to finish where I started, which is they need to show the Court the case. They need to show the Court the case that entitles them to an evidentiary hearing on this subject, writ large, period. But arguably, even more pertinently, under these circumstances. Because we don't -- we don't -- they have no authority. They have no evidence. There shouldn't be a hearing. And the Court shouldn't allow them to circumvent the strictures of Armstrong that they apparently think they can't meet, which is why we're here.

THE COURT: All right. Thank you very much, Mr. Harbach.

Mr. Blanche, I will give you two minutes if there is a

quick point you want to make, but then I will be recessing so that we can have lunch, give the court personnel a break, and I'm sure everybody in the gallery probably wants a comfort break too.

MR. BLANCHE: Just briefly on scheduling.

Your Honor asked the question about the DOJ policies around interfering with actions during an election year. The relevant policy or the relevant -- the relevant language is pretty plain that federal prosecutors and agents may never select the timing of any action, including investigative steps, criminal charges, or statements for the purpose of affecting an election or to give an advantage or disadvantage to any candidate. I think the appropriate question that the Special Counsel has not answered is whether, given the scheduling we're talking about right now and the compact nature, if the Court determines, as we think makes sense, that a trial could not take place before the fall, whether the Special Counsel objects to putting it after the election. Meaning, certainly it's the Court's decision, and nobody disputes that. But you're going to lean on -- you're going to ask the parties their view. And the real question that the Special Counsel has not answered is whether they agree that it would be complete election interference to have a trial anywhere near the time of this election.

I mean, we think it already is, for the reasons I have

already stated; I'm not going to restate them. But the question is whether, once we get to September, later August, October, is the Special Counsel willing at that point to say we consent to a trial happening after the election? That's the real question, Your Honor.

THE COURT: Okay. On that note, we will take a one-hour recess until 1:10. Thank you, all.

(A recess was taken from 12:09 p.m. to 1:16 p.m.).

THE COURT: Good afternoon. Please be seated. Everybody is present.

We will resume, as promised, with legal argument on the various motions related to redactions and sealing. We have, of course, a pending motion for reconsideration filed by the Office of the Special Counsel, along with various spinoff motions that raise similar issues.

For the benefit of the Court, I granted Ms. Dana McElroy of the law firm of Thomas & LoCicero the opportunity to present oral argument on these interesting and important questions that involve, of course, numerous pretrial motions, including a motion to compel discovery and associated attachments, and various substantive 12(b) motions on various topics that reference or attach material obtained in discovery.

As some background, for those in the gallery and listening in through the live feed, the Court previously ruled on these issues in the context of a motion to compel discovery,

concluding at that point that the Special Counsel had not made a sufficient showing to overcome the presumption of public access afforded to criminal cases. That order considered all of the filings that had been submitted to the Court at that point by both the Special Counsel, the defendants, and the Press Coalition. And, ultimately, that order generated the pending motion for reconsideration that is now pending, which asserts that the Court committed clear error in applying the First Amendment compelling government interest standard.

So that's a preliminary note. I wish to state that, of course, the Court takes matters involving openness quite seriously from all angles and, therefore, scheduled this hearing to hear additional argument on the various interests involved.

So with that broad overview, let me first hear from counsel for the Amicus. I understand Ms. McElroy is in the courtroom.

Thank you. Please make your way to the podium, ma'am. I have allotted about 15 minutes for your presentation, and then I will hear argument from the Special Counsel followed by defense counsel.

MS. MCELROY: Thank you, Your Honor. We appreciate the opportunity to speak today.

THE COURT: I want to make sure everybody can hear you properly, so just speak up if you can. You don't have to

actually touch that whatsoever. I ask that you do not. It's facing outward on purpose. But just position yourself so that you're heard.

MS. MCELROY: Okay. Thank you. Can you hear me now?

THE COURT: Yes.

MS. MCELROY: Again, we appreciate the opportunity. I'm here representing a group of media organizations that we can refer to as the Press Coalition. We have had a chance to review all of the filings. And I think the argument this morning was very instructive. As -- as an initial matter, I think it's important -- and the Court --

THE COURT: Okay. I guess I'm hearing that maybe the hearing is not as strong as we had hoped.

Let's do this. We have some portable microphones. Why don't we give Ms. McElroy one of those. You can attach it to your lapel or use the handheld.

MS. MCELROY: How is this?

Sorry.

THE COURT: Oh, that's okay.

Ms. Cassisi, do you want to help Ms. McElroy or --

MS. MCELROY: Does that work? Is that better now? Better now?

THE COURT: I think so.

Mr. Blanche, can you hear Ms. McElroy?

Let's do a test. Let's do a test.

MR. BLANCHE: Let's do a test. Thank you.

THE COURT: Happy Friday.

THE WITNESS: Happy Friday. Happy Friday.

I guess I will have to hold it.

MR. BLANCHE: Maybe if it's just a little louder with the voice, it would be okay. I would appreciate it.

MS. MCELROY: Okay. I will try to speak up.

MR. BLANCHE: Okay. Thank you.

THE COURT: Okay. Thank you.

MS. MCELROY: First, I would like to start by acknowledging that the order under reconsideration, it is our position, the Press Coalition, that the Court applied precisely the correct standards.

In that regard, looking at the Press Enterprise cases, for example, the public's confidence in the integrity of a prosecution is one of the most vital values that underlies the right to a public criminal trial. Transparency about the actions of our government, including the judiciary, is one of the cornerstones of democracy. And against that backdrop, what we have in this case, as Your Honor well knows, is a former president, public official, accused of wrongdoing in connection with classified documents. And we also have now a filing in which the former president and the other defendants essentially are calling into question alleged discovery violations in connection with the scope of the prosecution team.

And so, really, although styled as a motion to compel, I think what's developed through the record filings and the argument this morning makes clear that this is, in fact, a substantive motion that goes to the very heart of the issues in this case to be decided. It's not simply a discovery motion in the way, I think, that the government would like to characterize it and apply what I would consider to be a rather ordinary standard in an extraordinary case. That is not the law.

Whether you apply the First Amendment right of access to the records that are at issue here or you apply the common law, Magistrate Judge Reinhardt has recognized that, in fact, the tests are similar. And this Court, from what we can tell in the public facing documents, carefully reviewed the motion, the attachments, and the other matters that are under seal -- and we don't know what those are -- applied the correct test, a heightened scrutiny test that under any circumstance would be appropriate in a prosecution of this magnitude.

I think it's especially clear the more that we heard today, that the questions by the defendant go more to bigger issues than just "we need some discovery that we're not getting." And none of the cases cited by the government really address that issue where you have, essentially, a substantive motion.

THE COURT: So let's talk about that a little bit.

What is your definition of a judicial document? And how do you view the motion to compel that was filed in this case? Does it fall within the, quote, discovery motion category? Or does it fall within the substantive pretrial motion category requiring judicial resolution?

Again, this is bound up in the Chicago Tribune case which is a civil case. So I'm interested in your views on the extent to which Chicago Tribune should or is extendible to the criminal context.

MS. MCELROY: I think Chicago Tribune is clear that it's a -- you know, it concerned a civil case. It has been, the idea being, that it recognized a First Amendment right of access to documents in a criminal case. But carved out, the situation there was post- -- you know, post-lawsuit, the press came in and tried to intervene, tried to get to documents there that were considered to be trade secrets. And the Court was especially, I thought, you know, elucidating that -- let me just find the case. I apologize. It said -- it said there that the constitutional right of access has a more limited application in the civil context than it does in the criminal, of course. Materials gathered as a result of the civil discovery process do not fall within that scope.

And that's really not what we're talking about here. What I believe that we're talking about and what many of the cases that we cite point to, is truly a judicial document. And

judicial documents are defined in many, many ways, but one way that it's defined in the Al -- Shahi case is used, if -- if the issues are being used to determine a litigant's legal rights. And I think that's what we heard this morning from defendants. There -- they're alleging and pointing to facts, all of which we cannot see, that this prosecution is vindictive, politically motivated, and that there is some sense that the scope of the prosecution hasn't been broadly enough defined. Those -- those issues go to the very heart of the case. And they also, of course, as I understand it, go to what discovery could possibly be -- be due. But they essentially go to how wide is the net cast, and, also, then getting to motivation. And that unquestionably, I believe, is -- qualifies as a judicial document; the motion itself, any filings that are associated with it. Because it's not simply, we need some more discovery. It is -- it is actually raising allegations that are central to the case in the end.

THE COURT: Are you aware of any cases specifically in the 11th Circuit that address this issue in the criminal context specifically?

MS. MCELROY: Judicial documents?

THE COURT: Yes. Or documents filed in the course of pretrial proceedings.

MS. MCELROY: There are many cases that talk about documents filed in the course of pretrial proceedings. Let me

see. In the 11th Circuit --

Well, I first also wanted to point out that under U.S. vs. Marivel cited by the defendants, it's up to the Court's discretion, in any event. And the Court has a right to exercise that discretion.

In Newman vs. Graddick is one case in which there was a -- a right attached to documents there that were -- that was a civil case. But a right attached to what was considered to be a quasi criminal set of documents.

I can't, off the top of my head, come up with more documents. We have, of course, had portions in this case of the search warrants that have been ruled to be by Judge Reinhardt should be disclosed under a First Amendment and/or common law analysis that's heightened from a good cause standard.

So in this case in particular and cases that we cited in our motion, Judge Reinhardt recognizes the right of the press and public, and that's really what we're here to understand. And I think what this motion raises is, How does this process work? What is a scope of prosecution? What -- what does that mean in the -- in the context of prosecuting a former president for -- for allegedly withholding or taking classified documents?

And so the educational function alone, in addition to -- to the check and balance system of being able to see and

understand the workings, but the educational function, which is a part of the actual good cause test under the common law right.

THE COURT: So just to clarify your position for -- from what I understand, the Special Counsel's view is that, because the motion to compel attaches materials obtained in discovery, that it is a discovery motion; that it, therefore, receives only the good cause standard, despite this being a criminal case. And I would like to hear from you what is your view on the application of the good cause standard alone in this case for purposes of the motions to compel? And then do you distinguish that at all for the pretrial motions that are explicitly filed under Rule 12(b), such as the motion to suppress, motion to dismiss indictment, et cetera?

MS. MCELROY: I think that the -- the good cause standard they have referenced, the government has referenced, is sort of a watered-down version of what the courts have defined good cause to mean in the context of access to judicial records under the Nixon case, which is very much aligned with the First Amendment. So it's -- it's a little bit -- it's -- it's like good cause, but not just when you're in a civil case or, you know, this is good enough. You have to balance the public's rights of transparency against a compelling or serious issue on the other side.

And I'm not saying that they couldn't do that. But the

good cause, as they are reading it, is far too narrow when you look at the constitutional framework and even the common law framework of access to judicial records filed in criminal cases.

And I do believe that those same standards are definitely going to apply to any motions to suppress, any pre -- any other pretrial motions. And that's sort of -- I think the parties today used the word "cascading." Well, once you start to cascade sealing, that you then have then closures when you're talking about the records that -- that the public is seeking access to. So you end up with a situation where you have so much secrecy that it's very, very difficult to -- for the public to understand what's happening and to really judge the process.

I think the allegations here are serious. And whether or not they're true, nobody knows just yet. But the ideas expressed in the filings by Former President Trump I think are so critical to -- to the understanding of what ultimately is at stake in the prosecution of a public official which, of course, a former president, to my knowledge, is unprecedented. And that's why I believe strongly that, given the line, the unbroken line of cases from the U.S. Supreme Court and the cases in the 11th Circuit, I don't think there is any doubt that the 11th Circuit would apply a First Amendment standard or, at a minimum, the heightened standard of good cause under

the common law right.

THE COURT: Why do you say that?

MS. MCELROY: Well, you can read the cases that -- that are even cited by the government. The cases that are cited by the government --

THE COURT: Well, I think they would say the Chicago Tribune, although a civil case, references discovery motions and so we should apply that in the criminal context, even though that decision expressly makes a point about distinguishing the two contexts.

MS. MCELROY: Right. And in the -- it really does. And it actually talks about the -- the Chicago Tribune case does talk about and gives nod to the idea that, you know, there is a common law right of access and you have to distinguish between things that are properly considered public or judicial records and those that are not. That's the distinction that I'm trying to make here. Even in that case they recognized, the Court did, that we're not talking about garden variety discovery materials that are filed in connection with a motion. We're talking about a motion, although styled a motion to compel, and all of the offshoot responses that really, again, get at central due process concerns that are really the type of records. And then, you know, concurrent after that, access to proceedings, should the Court set hearings on these issues.

THE COURT: Just to make sure, can everybody hear

Ms. McElroy or is the audio -- okay. Please proceed.

MS. MCELROY: In the Nixon case it's a good example of where the 11th Circuit is cited by the government where the 11th Circuit basically did not find a common law right. And there it was a situation where the -- the government had asked for an in camera inspection, much like you would see under, I guess, it's Rule 16. And -- and the Court had found that the -- after doing an in camera inspection, that it did not -- the transcript did not need to be turned over to the defendant under Brady. And when the defendant appealed his conviction, the Court said that was not the type of record that would fall within the First Amendment right of access. And you can see why. They likened it more to a discovery -- a real true discovery-type record, as in the Anderson case, which was a Rule 12 bill of particulars.

We're really talking again, and I can't make the distinction enough, while it's true -- and I would concede that discovery materials are classically not covered or not within the scope, particularly unfiled discovery materials, but this is a different scenario. This is a scenario where the defendant has come to the Court, brought forth discovery materials, alleging serious issues with the prosecution that I believe the Court will need to decide to determine the scope of discovery, and also the defendants' due process rights.

And in that scenario we're really looking at a true

substantive motion, a judicial document to which a First Amendment and/or again common law right of access applies. And the Court, I think, has been mindful to review the material and to review it with an eye towards what the government is saying in terms of compelling or competing interests. And we would -- we would say that that is the Court's function as a gatekeeper to continue to do that.

But in that regard, the government does have a burden to show that what will -- what they fear will happen will actually happen. And it's more than speculation and it's more than argument. I think they argued this morning the exact opposite in terms of what -- you know, you can't use argument as facts. And I think that that's -- that's the situation we're in on a very important issue that will become -- it appears, anyway, to the press -- become a bigger issue in the case.

THE COURT: Okay. Does it make any difference to you that the defendants are not seeking closure of these materials? Because occasionally in the case law you have a defendant who is arguing in favor of closure to protect his or her right to a fair trial. We don't have that here. Does that impact your inquiry at all?

MS. MCELROY: I think it really does because you're not -- you don't have competing constitutional interests where you typically would. There are lots of case law concerning a

defendant's Sixth Amendment right to a fair trial. But there is also case law, which I'm sure the parties will discuss, where the defendant also has a right to a public trial.

And it definitely -- definitely the situation we are normally in is where a defendant seeks to shield information that that defendant believes will jeopardize its right to a fair trial, or their -- his or her right to a fair trial. We don't have that same kind of competing constitutional interest in the balancing that the Court must do. Or, not that there aren't serious concerns; there are. But I think it's the Court's function to review the materials that we can't see, and -- and make judgments and determinations, and that's really within your discretion to do so.

THE COURT: All right. I think this might be my last question for you and then I will ask that you wrap up.

Of course, I'm going to hear from Mr. Harbach or Mr. Bratt on these issues, but as far as I can tell, their position is that if the document references material obtained in discovery in a criminal case, it never gets the benefit of First Amendment protection because the information at issue derives from discovery.

Are you aware of any case that applies that view?

MS. MCELROY: Well --

THE COURT: In other words -- and perhaps I was confusing in my articulation. But I think the argument is that

the second it references discovery material, even if in a criminal case and no matter what type of motion it is, could be the most substantive motion in play, it will not get the First Amendment protection because it implicates discovery material.

MS. MCELROY: Absolutely not. And, in fact, the Court in your order cited to the Time case, and we've cited to other cases in our papers. There is not such a case that says that because it could never be the case that just because it's discovery material when it's brought to the Court -- for example, in a motion to suppress. That -- that's a public proceeding, typically, and a public filing. So it's just at what point in the process?

If you're just pouring discovery material into the record in order for it to become public, that's a different situation. That's not the situation that we have here. And no case says ipso facto discovery in and of itself means that you never get access to it. It really is attached to: What is the bigger picture in what the Court is doing? What is the judicial labor all about in this case?

And the judicial labor by the Court, of course, is going to be to decide, as much -- as much as I can understand it, the scope of the prosecution, and also to what extent that would impact the defendant's rights, both in terms of due process rights, for any, also, motion to dismiss the

indictment, any motions to suppress, any Brady material, all of the substantive things that will be discussed. It's not simply discovery material.

But, no, absolutely not. Discovery does -- you do factor in what type of a document it is, and you can see that in the 11th Circuit cases. But the discovery that they're talking about in those cases can be easily distinguished from what we're talking about here. And so it's a red herring to me.

THE COURT: Again, the Anderson case, I think it was a -- a 404(b) notice, or something along those lines, a notice advising the defendant of the government's intent to use evidence of a prior conviction, not a motion itself.

Am I correct in that understanding?

MS. MCELROY: Yes.

THE COURT: All right. Well, thank you. If you don't have anything further, Ms. McElroy, I will then turn to hear from Mr. Harbach or Mr. Bratt.

MS. MCELROY: Thank you, Your Honor.

MR. HARBACH: Just a second, Judge, please.

THE COURT: Take your time.

MR. HARBACH: Good afternoon, Your Honor.

THE COURT: I do want to make a quick point. Do you plan on showing any exhibits or materials?

MR. HARBACH: No, ma'am.

THE COURT: Okay. If you were, then, of course, you would let me know in advance because that wouldn't transmit to the overflow room.

MR. HARBACH: Yes, Your Honor.

I hope it's helpful to outline for Your Honor at a high level what my presentation is going to cover today. First, I'm going to -- I will make just two preliminary points. Then I'm going to turn to the substantive legal standards that are applicable to various combinations of discovery and motion types. Then, the third thing is, I would like to revisit where we are procedurally in terms of what the parties have done and where we're -- where we are. And then, finally, application of those legal principles that I have articulated to -- at the beginning the categories that the Court laid out in its agenda order for today. But at that point, if Your Honor wants to get more specific, I will -- I will be guided by Your Honor.

And I will also say that I will ask for just a little patience. I assure the Court that I will get to and address completely and in detail the question Your Honor was posing to the Press Coalition about why a motion to compel in our view is not a judicial document. I promise I will address that, but I just need a little time to get there.

Okay. So the two preliminary points that I would like to make are, first, why we're here. Your Honor articulated very clearly its interest in assuring the openness of these

proceedings in accordance with the Constitution and the law. The government shares that -- shares that position, obviously. Another position that we both share is having a dual responsibility to protect witnesses and to ensure the integrity of the criminal process.

Part of that responsibility in any criminal case is maintaining the confidentiality of witnesses' identities for both reasons, both safety and the integrity of the proceeding. But in this criminal case, it is especially important because of all that has already happened elsewhere. There has been so much harassment, intimidation, threats to witnesses, threats to court staff, law enforcement, connected to any case in which Mr. Trump is a defendant. In the government's view, this is not some hypothetical concern as they suggested in their filing last night. It is a real concern, and they know it. That is why we spend as much time as we have briefing this and doing the tedious scrubbing of all of the exhibits and line by line on all of the motions that they have filed.

THE COURT: Well, of course, that was after -- after not doing so initially --

MR. HARBACH: Yes.

THE COURT: -- to be frank.

MR. HARBACH: And you've presaged my next preliminary point. Why didn't we make more of a showing initially? Let's just say it.

THE COURT: And in order to challenge any of the legal standards being put forth, so -- and that's to say nothing of the local rule requirement that would have required a particularized showing. So even at the most basic level, the showing was deficient.

MR. HARBACH: Yes, Your Honor. I understand that, that message. And I would just like to make a few observations about that. And it's not by way of -- not by way of fighting you on that, but it is by way of explanation.

As -- as we explained in our papers, we relied, perhaps overly so, in our understanding of the import of the protective order in this case. It's the entire purpose of a protective order. The defendants make no mention of a protective order anywhere in their papers. This is a protective order that was entered by a judge of this court. And, by the way, it was unopposed. And it was entered for the reason that all protective orders are entered, to protect nonpublic information relating to witnesses, other third parties, grand jury exhibits, grand jury transcripts, and recordings of witness interviews. That litany of stuff is what was in our motion for the protective order.

So please don't misunderstand the point here. The -- had the government to do it over again, we -- we would have done what we later understood to be Your Honor's expectations and satisfied them in a more fulsome manner.

But the two observations on that are, one, we were, as I say, fully cognizant of the protective order. So it had nothing to do with the importance of witness security being anything other than the forefront of our minds. And, Number 2, despite whatever noise there may be out there, I know Your Honor knows this, but I'm going to say it anyway, at no point did we mean any disrespect to the Court, either in what we filed initially or in filing our motion for reconsideration.

We -- we want to get this right, and we want to put the Court in the best possible position to get this right. We recognize that we could have done a better job of that initially, and so we are owning that.

So those are the two preliminary points I wanted to make.

If we could turn to the substantive legal standards now. And I'm -- I'm going to walk through them. I think starting with what is probably non-controversial and then maybe getting to some of the stickier ones.

I think we can all agree, and I believe I heard the lawyer for the Press Coalition say, that for discovery materials in general, putting aside their potential attachment to a motion, that there is no First Amendment right of access to those, and there is no common law right of access to those. That's straight from Chicago Tribune and many other cases citing in our briefing.

THE COURT: I don't think anybody is disputing that, nor did the Court's order insinuate as much. I think we're all on the same page there.

MR. HARBACH: Okay. But an important point to remember that is part of the factual record here is, this isn't just discovery, it's discovery that was produced under a protective order. A protective order that, again, was supported by good cause and that the defendants did not oppose.

THE COURT: Well, sir, I take that point. But a protective order, at the end of the day, is a contract between parties. It doesn't bind the Court. It doesn't supplant binding legal principles that have to be applied. It doesn't, for example, obviate the need to make the showing under the local rule. And so we're still in a position of -- and I get your point on the reliance issue with the protective order, but just looking at the legal principles now -- and let's get to the heart of it -- understanding there is no freestanding right to discovery just floating around, I completely agree with that.

What happens when that material is made part of and is relied upon by defendants in pretrial motions? And pretrial motions, of course, have different flavors. On the one hand, we have the motion to compel discovery, and then, on the other hand, we have a number of other substantive motions.

MR. HARBACH: Okay. So I -- a couple of things in

response.

First, because Your Honor mentioned it a moment ago, I think it might be helpful to discussing the civil/criminal distinction.

THE COURT: Yes, please, that would be helpful.

MR. HARBACH: Okay. So to that point, we pointed out in our papers two cases, both of which have been mentioned this morning; both Nickens and Anderson. Anderson, which predated Chicago Tribune, and Nickens with postdate -- which postdated Chicago Tribune.

Now, bear with me one second.

THE COURT: Are you going to talk about Nickens first?

MR. HARBACH: Well, Nickens, I was going to mention -- I mean, I recognize it as a possible limited utility where we are, but it is a criminal case.

THE COURT: Why? Because it's unpublished? Or --

MR. HARBACH: No, no, no. No, I just mean because it doesn't get to the motion point. It just says discovery. So on the issue of whether discovery in general is subject to either a First Amendment or a common law right of access even in a criminal case, we think Nickens answers that.

Furthermore, Anderson, which is also a criminal case -- this case was decided right after Press Enterprise. And so -- and the conclusion of Anderson in this criminal case is that discovery is not -- does not qualify for a First Amendment

right of access. And they apply the same history and logic test that the Supreme Court applied in Press Enterprise. This is on Anderson at page 1441.

THE COURT: What specifically was the document at issue in Anderson?

MR. HARBACH: I think Your Honor may have been right about it being a bill of particulars and its -- its notice. That's right.

THE COURT: So why isn't that --

MR. HARBACH: Or a 404(b), excuse me.

THE COURT: -- distinguishable? That's very different. That's a notice. It's not a substantive motion. It's not put before the Court for judicial resolution of any substantive legal claim unless it then is converted into a motion for introduction of 404(b) evidence, perhaps. But on its own, the notice functions like that freestanding discovery principle that I think we agree about.

MR. HARBACH: If what Your Honor means to say is that, in the Court's view, the distinction in Anderson between -- whether -- whether what type of document it is isn't really controlling, if it's -- if it's discovery -- again, I'm not talking about what it's attached to yet.

THE COURT: Uh-huh.

MR. HARBACH: But if it's discovery, it's -- it is not subject to a First Amendment right of -- right of access.

THE COURT: I think -- I think the trouble that I have with your view is that it seems to say that no matter what the discovery is used in, if it's discovery, then in a criminal case, the First Amendment qualified right of access wouldn't apply. That seems to be the logical import of your position, as far as I can tell. And I haven't seen any case law to support that.

MR. HARBACH: Right. And our position is not that because any motion that any discovery gets attached to automatically means it's insulated from any disclosure. It's not our position. It's not our position.

THE COURT: Okay.

MR. HARBACH: But I think it does -- it does matter what type of motion it is. In other words, whether it is a judicial motion is the -- the terminology that we have been using to this point. If it is -- if it is a regular, mainline discovery motion, like a motion to compel, and the government's position is that by virtue of its function as part of the discovery process and it being limited in that way, that it also -- that that motion and its attachments are also not subject to a First Amendment -- let's put it this way -- at best, maybe a common law right of access.

And this -- this is the -- the source of the Court's error, in the government's view. For the reasons laid out in our brief, the -- the Court applying the heightened

First Amendment -- Your Honor understands -- so that is why our view is that when --

THE COURT: I guess that's what I would like to understand a bit more. As far as I can tell, there is no -- you rely heavily on Chicago Tribune. It's a civil case. Your position, essentially, requires extending that to the criminal context.

MR. HARBACH: Correct.

THE COURT: Okay.

MR. HARBACH: But we argue -- I'm sorry to interrupt, Your Honor.

THE COURT: No, please.

MR. HARBACH: I was just going to say that it's the reasons that I explained a moment ago, cases like Nickens and Anderson that make it plain, in our view, that that same principle applies in the criminal context. Period.

THE COURT: What do you make of the footnote in Anderson that seems to sort of carve out Rule 12(b) motions? And I can't find my copy of Anderson for some reason.

MR. HARBACH: That's okay, Your Honor. I know the footnote you're talking about.

Well, first of all, I don't -- our reading of that is that it is not -- it is not quite the same carve-out that the defense reads it as. It's footnote 2 on page 1440, Your Honor.

THE COURT: So they're talking there, trying to

distinguish the notice. Again, it's a 404(b) notice.

MR. HARBACH: Uh-huh.

THE COURT: And the Court says, quote, the defendant's motion for notice of similar acts evidence cannot be regarded properly as a Rule 12 motion requesting discovery under Rule 16 because similar acts evidence doesn't fall within the categories of information such as documents and tangible objects that the government must furnish upon the defendant's request.

So --

MR. HARBACH: I just -- I note the distinction. I just -- I think it is -- it is reading too much into that footnote to -- to say the conclusion that the defendants draw from it. That, as a result, a First Amendment right of access would apply. We just don't read it that way. And so --

THE COURT: Would you acknowledge that other circuit courts have applied the First Amendment in pretrial proceedings, including at least one circuit, the 4th Circuit, in the context of a motion to compel? I know you --

MR. HARBACH: You are talking about --

THE COURT: -- you recognized that it's maybe not the most fulsome explanation of what is going on in that opinion, but I think we would all agree that it's at least involving a motion to compel, among other motions.

MR. HARBACH: You're talking about the 4th Circuit's

case in In Re: Time?

THE COURT: Yes.

MR. HARBACH: Yes, Your Honor. It plainly says what it says. Our position on that is that because it is phrased in that way and in that manner and in an undifferentiated manner, that -- that the 4th -- that one should not extend the 4th Circuit's holding there to reach the documents that underlie the discovery motion.

THE COURT: So how do you -- in the criminal context, how do you create a principled distinction? It just seems like -- so we would say on the one end, if it's -- if it's a discovery motion, we treat it a certain way. We apply only the common law right of access which requires balancing of interests, maybe even something lesser, according to the Special Counsel. But then when we shift over to pretrial motions, we apply a different standard --

MR. HARBACH: Uh-huh.

THE COURT: -- in the First Amendment context because it's a criminal case. Of course, the 9th Circuit seems to think there would be, really, no meaningful way of drawing those distinctions, and we would just, sort of, treat these as pretrial motions in pretrial proceedings which are, of course, pivotal and essential to criminal cases.

So these are complicated issues. But I think one thing is clear. There is no clear decision from the 11th Circuit

that would warrant an assessment that the Court's order was clearly erroneous.

MR. HARBACH: Okay. Agree with you, it's a complicated area of the law. I will not purport to have surveyed the state of the law in all of the circuits. But where we part company with the Court is the last point, obviously.

It is our view that Chicago Tribune, in saying what it says, which is explicit not only about the discovery material, but also -- even when -- even when it's filed with discovery motions. We all know the language that we're relying on. And what I have been trying to explain to Your Honor this morning is that there is -- in light of the cases like Nickens and Anderson, there is no reason to believe it shouldn't -- it shouldn't -- there is no reason to believe that the situation would be any different in a criminal case.

We acknowledge --

THE COURT: I think that's debatable. The Press Coalition seems to think there is a much higher likelihood that the 11th Circuit would apply a First Amendment standard.

But can we now get to the nuts and bolts? So I would like to talk about some of the categories of information that you're concerned about. Obviously, I'm open to reasonable measures to protect witness safety. Clearly, I think the safety and well-being of witnesses has to be -- has to be considered in top of mind. But, of course, it has to be

accompanied by a sufficient showing.

And what I'm concerned about is the sort of blanket request that you make in your papers that any witness name or statement warrants redaction from public view. Perhaps you have an argument that is compelling on the name, and maybe there is a way to do some kind of anonymization list. But then you start to get into substantive statements, and the case law really starts to fall apart to suggest that substantive statements of witnesses whose statements are made part of substantive pretrial motions all of a sudden get off the table.

MR. HARBACH: Yes. I -- I'm going to hesitate right now to make too many broad-brush pronouncements about the law, but I think -- I think it is helpful to examine application of these principles here. And I think that I would like to make one more comment about our position on the law. It will be brief. I just wanted to make sure Your Honor understands.

Our position is that for discovery attached to dispositive Rule 12 motions, for example, our position is a little different. Chicago Tribune makes quite clear that there is a qualified common law right of access and that it attaches to those materials. So I --

THE COURT: But you don't even agree that on that it's First Amendment?

MR. HARBACH: That's right.

THE COURT: Okay. Even though it's a criminal case?

MR. HARBACH: Correct.

THE COURT: And even though other circuits have applied the First Amendment to substantive pretrial motions?

MR. HARBACH: When you say "applied the First Amendment," you mean --

THE COURT: Yes. Required a compelling government interest showing narrowly tailored.

MR. HARBACH: Okay. So I think that the question about whether the common law right of access attaches or the First Amendment right of access attaches, I think Chicago Tribune answers that question definitively in the 11th Circuit.

THE COURT: Even for criminal cases?

MR. HARBACH: Yes. But please -- please recall what the -- what the result of our position is. We are agreeing that a common law right of access applies --

THE COURT: But what -- I guess I don't understand why the resistance to applying the First Amendment? This is, after all, a criminal case. You have Press Enterprises. You have other cases that emphasize the fact that criminal cases require and warrant a more elevated showing. I don't see that really engaged with in your papers, and it's almost like we start at that civil proposition and never get higher.

MR. HARBACH: Well, it -- well, if by "that civil proposition," you mean Chicago Tribune, that's what -- that's what we're relying on. That's right. Because that's what

the -- that's what the opinion says.

THE COURT: Right. But it clearly draws a distinction as between criminal and civil. And I'm not sure that you're --

MR. HARBACH: Well -- I'm sorry, Your Honor. You're not sure that we're -

THE COURT: That you're quite acknowledging the fact that the Chicago Tribune is a civil case. So then it really gets us to the Press Enterprises point, and then we talk about logic and experience. And then we ask ourselves, well, what place, what process are we in? And it can go on and on. It's very academic.

But what I want to understand is, why the First Amendment, in your view, doesn't apply whatsoever as long as the information cited in the substantive motion derives from discovery, which I think is your position.

MR. HARBACH: That is correct. And -- and I -- I'm not sure what else I can say other than we think that the holding in Chicago Tribune controls, and that its being a civil case is not enough to change that result.

THE COURT: Okay. I understand your point.

MR. HARBACH: Now, as I said earlier, before we -- I do want to talk about the Court's categories, but I also would like to -- because there have been so many motions and exhibits and whatnot flying around, I want to try and do a little organizing, if that's okay with Your Honor.

So let's talk about what's happened to this point. With respect to both types of motions, that is to say, the motions to compel which we allege are discovery motions and the Rule 12 motions which we agree are substantive in some sense.

With respect to both of those motions, the government has proposed, requested, and requested from Your Honor, limited redaction and sealing. We have not taken the position (indicating) it's all off limits, forget about it. Even for -- for straight discovery motions like their motions to compel, in our view it would have been fully defensible for us to have taken the position that none of those exhibits should be public in any portion whatsoever. But we did not do that.

For the Rule 12 motions, we think it would have been fully defensible for us to have taken the position that because the discovery was produced under a lawful protective order, that good cause was necessarily found, justifying sealing all of those exhibits, but we didn't do that. We didn't take that position either. In both instances we have requested and tried to talk to the defense about very -- in our view very limited redactions. And to the extent that the right of access applies to the motions themselves, we have requested really limited redactions in those that, in our view, are amply justified by good cause.

THE COURT: On the -- on the limited nature of your redactions, is it the case that you're seeking the redaction of

any substantive statement made by a, quote, potential government witness? And I have a couple of questions here.

Number 1, I know there was a witness list of some kind that was exchanged as part of the bond proceedings in this case. How many people are on the list of potential government witnesses?

MR. HARBACH: I want to make sure I understand Your Honor's question. Are you asking how many people were on that list at the beginning of the case?

THE COURT: Well, I hear a lot of potential government witnesses, and I want to know are we talking about 200? 100? What's the likelihood that these people even testify? It's hard to tell.

MR. HARBACH: Can I have just two seconds on that.

THE COURT: Yes. Yes.

MR. HARBACH: Your Honor, I think -- I can offer an answer that might be somewhat helpful. My colleague reminds me that that initial list that we supplied in connection with the --

THE COURT: The no contact order.

MR. HARBACH: Thank you, Your Honor. Was about -- was 80-some people.

THE COURT: Yes. I recall the number 87.

MR. HARBACH: Something like that.

THE COURT: Okay.

MR. HARBACH: Our -- our estimate at this point is that the number of government witnesses at trial will be something in the neighborhood of 40 or so.

THE COURT: Okay.

MR. HARBACH: But for these motions, the ones the defendants are talking about, for the -- for the instances where we have claimed or requested redactions because they're witness statements, I mean, that number is probably more like 25, 20 -- 25 or so.

THE COURT: So a majority of the likely witnesses are the subject of these redaction issues, give or take some.

Okay. I at least have a better sense of the numbers.

MR. HARBACH: Yes.

THE COURT: Now, as far as the redactions, if some materials were obtained by defendants through FOIA requests and then others from discovery, I tried to figure out if any of the proposed redactions were being made on the FOIA materials, and I wanted your answer on that.

MR. HARBACH: Zero.

THE COURT: Okay. That's what I thought.

Okay. Is there any crossover in terms of the names, some of the names appearing in the FOIA versus the discovery?

MR. HARBACH: There might be. But -- but even if there were, that wouldn't be a reason to unseal it in the discovery, in our view. In other words, something that's

public -- publicly accessible via FOIA and obtainable, one might say, oh, well, that person's name is already out there. Well, in some sense, yes, that person's name is out there, but that person's name isn't out there as a government witness. There is a big difference. So that's why we don't -- that crossover, we don't think --

THE COURT: And that wouldn't, in fact, feature at all in a potential balancing analysis, assuming you were doing common law. I mean, it just seems like maybe that would come into play.

MR. HARBACH: It might. But I think that also might depend on the category of stuff we're talking about.

THE COURT: Okay.

MR. HARBACH: So I would like to make -- I think it is also reiterating the second half of where we are procedurally. I have talked about what the government has done. I want to talk about -- a little bit about the position the defense has taken.

They -- and Mr. Bratt alluded to this briefly. They have attached numerous gratuitous, irrelevant, and unnecessary exhibits to both their motions to compel and their Rule 12 motions.

I will direct -- I will shorthand this by directing the Court to pages 19 and 20 of our motion for reconsideration for examples of what I'm talking about. I'm not going to go

through them in detail here, but those are the examples.

To summarize, these are exhibits that are sensitive information that is utterly irrelevant to what they cite the exhibit for. And to boot, part of -- the part --

THE COURT: Well, I know that that's your view, and you might be right, but I still need to decide is this a judicial document or not? Apply the correct standard.

And then these issues of, well, it's not really important to their argument, or I think it's unrelated, or I think it's frivolous, sort of gets you down a rabbit hole that is -- is secondary to the first question which is, is this a judicial document?

MR. HARBACH: I -- I -- I suppose that's in the eye of the beholder. But in the government's view, it is an important characteristic of the posture we're in that, Number 1, they have done this and, Number 2, they have refused to entertain anything short of wholesale production of every single exhibit that they have except for PII. That's the -- that's the second thing. And then the third thing is -- and this one is a little puzzling to me -- but they have repeatedly purported to take no position on any particular document.

They have -- they have said that as recently, I think, as last night -- that they take no position on any particular document.

THE COURT: I don't know. Perhaps, it has something to

do with the burden. Who has the burden to make the showing?

MR. HARBACH: To make what showing?

THE COURT: That sealing is warranted and that we should deviate from the presumption of openness.

MR. HARBACH: Well, I think it depends whether a common law right of access or a First Amendment right of access attaches.

THE COURT: Either way, whichever standard applies, the party seeking the sealing or the redaction has to make the showing. You would agree with that; right?

MR. HARBACH: Well, I actually think it depends.

THE COURT: Okay.

MR. HARBACH: But I'm going to put meat on those bones, I promise.

The last point I want to reiterate is that I don't know why they haven't taken any position on any particular motion. Maybe they can't articulate one on any particular document that is sufficiently tailored to why the document was put in there; I don't know. But I do know they've had the opportunity to. Because we've had multiple rounds of conferrals. We have been careful. We have been thorough. We have made good faith efforts. We have sent them some of the same red box-type documents that we have sent the Court.

And they -- like I said a minute ago, zero order [sic], refuse to apply any redactions beyond PII. So they've filed

exhibits that are gratuitously bloated. They take no position on any given document. They refuse to agree to any redactions at all besides social security numbers and email addresses. And they know that publications of witness' names and statements endanger them. This is not about Donald Trump vindicating the First Amendment. It's just not. And we have to call it out for what it is.

So why do I say that? Because that informs our position in the degree of skepticism we have when they attach a document that includes 17 pages, like, for example, the document that -- that I think lists out all of the names of the FBI agents who were at the Mar-a-Lago search and they cite that for the proposition in their brief -- it's -- its proposition in brief and then cite. And the proposition in the brief is agents were communicating on the day of the search. And then they cite this exhibit. It's gratuitous. And so I think when Your Honor is rightly trying to --

THE COURT: Let me ask you, let's say we did something like a half measure which is, okay, let's use a legend of anonymous names. Let's say there is somebody from NARA in the documents, "NARA official Number 1." And then we have a little chart and then we substitute all of the names. And then we put those in there as placeholders and then maybe we have a hearing, we use those anonymous descriptors. These are the sorts of mechanical challenges that are presented by these

matters. So I'm trying to manage this.

MR. HARBACH: I know. I know you are. I know you are.

THE COURT: So what do you have to say about potentially that as an option?

MR. HARBACH: I hate to sound like a broken record. And I'm sorry, but it really depends. And so if it would suit Your Honor, I think one of the -- one of the categories that you -- sorry -- the list of categories in the agenda that you wanted us to address included names of witnesses, substances of their statements, grand jury stuff, search warrant applications, and then a miscellaneous category.

Would it be helpful for me to talk about those?

THE COURT: Yes, it would be.

MR. HARBACH: Okay. So let's -- I mean, I don't think I need to say a whole lot more about the names of potential government witnesses. So I'm going to move on to the substantive statements, the -- what we -- what we have --

THE COURT: Before you move on from that category, I just want to understand it. Again, absolutely no minimization of potential threats, but -- is there any additional factual information that you can provide the Court to substantiate this -- this concern that publication of names will actually lead to intimidation? Of course, we have intimidation on the one hand. We have discomfort, perhaps, on the other end of the spectrum. Obviously, we live in an age of the internet.

And -- and at some point, you know, it may not be possible to entirely shield everybody from some degree of public exposure on the internet.

And so I think it's quite challenging to try to come up with reasonable solutions. Mindful, of course, things of physical threats, concrete, reasonably specific intimidation concerns, anything that is expressed. I went through all the cases that you cited, to talk about where courts have done closure. And all of those really came on the heels of specific, express concerns by witnesses that had actually received intimidation from either a co-defendant or something along those lines.

And what I haven't really seen is this blanket request that anybody on the list, their names, is off the table, and then to even go further and say none of their statements, even if substantively used in the motions.

So I think your position to some extent is somewhat unprecedented. And I have also gone through, trying to find other high profile cases to see if measures like this, this blanket request for no names, no statements, has ever really happened, even in Mafia cases and -- and in other political cases with those sorts of ramifications. Again, it's been hard to find those examples. I have really tried to be as comprehensive in the analysis here. And I'm -- I'm happy to hear more argument from your end on that, if you have any.

MR. HARBACH: I do, Your Honor.

On the names, the -- in terms of the -- not only the record that we have, but the record that is required by the case law, and the cases that talk about the judges -- the judicial branch's obligation to protect people and what -- and what must be shown.

You mentioned that you've looked through our cases. There -- in our brief there are cases cited at -- and by our brief, I mean our motion for reconsideration. There are cases cited at pages 14 and 15 in our brief, essentially making the point that courts imposing protections about witness names and the like are -- are -- are and should be prophylactic. It shouldn't take somebody to get threatened or get injured in order for a court to endeavor to protect identities of witnesses.

THE COURT: I think you're right about that; you don't need -- you don't need a materialized threat, but you also need a sufficient showing, and I think that's the challenge here, is what is enough, what is -- what is -- in the Addison case, for example, you had an individual who expressed concerns directly to the Court in a two defendant case. There are others that we have gone through, Addison.

MR. HARBACH: So there is Doe.

The fact that the government did not identify specific threats on the record did not make the risk entirely

speculative. And direct threats are not a strict condition precedent to a District Court's granting of a closure motion.

THE COURT: I agree with that.

MR. HARBACH: So in terms of the -- the showing that we have to make, I'm -- I'm not going to -- I'm not going to get on a soapbox right here about all of the -- all that's in our papers. There is plenty in our papers about -- that have -- that has happened in any case in which --

THE COURT: In this proceeding, have there been any allegations of intimidation by defendants?

MR. HARBACH: No.

THE COURT: Okay.

MR. HARBACH: But that is far from the --

THE COURT: Excuse me. Are there any witnesses in this case who are on the list who have come to the government with expressed concerns about their personal safety?

MR. HARBACH: We have made reference to them in our filings, including the sealed one --

THE COURT: Okay. Okay.

MR. HARBACH: -- that we tried to keep ex-parte.

THE COURT: Right. And, of course, I know you want to do things ex-parte, and I acknowledge that, but that's also a very high standard. And, again, there really was no basis to keep that ex-parte. I know you take a different view.

MR. HARBACH: We do.

THE COURT: Okay. Okay.

So -- all right. So let's talk about the actual categories of information. I think we've talked about names. I understand your view there.

MR. HARBACH: Statements. You have mentioned that a few times.

THE COURT: Yes.

MR. HARBACH: And, you know, the defense has chided us in their materials for arguing that -- or allegedly taking the position that the materials subject to the Jencks Act, you know, they use words like "automatically." Should automatically be protected or like it's some label that we can slap on anything and it carries no meaning. That's wrong.

As we say in our papers, the Jencks Act is frequently talked about as requiring disclosure of witness statements after they testify at trial. But it is, in the first instance, a prohibition. No statement or report in the possession of the United States, which was made by a government witness or prospective government witness, shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination.

Why? As we sit -- one of the few things we did say in our opening paper on this, was why that is. And the Supreme Court has answered that question. It is to prevent defendants from rummaging through confidential information containing

matters of public interest, safety, welfare, and national security. That's Goldberg vs. United States.

So the other thing that is important to remember about the Jencks Act is that it prohibits compelled production of these documents, these witness statements to the defense. Not the public. The defense. They're not even producible to the defense until after a witness actually testifies at trial. There is a reason for that. They're important. They're not just -- they're just not any -- they're not just statements. There is a reason the Jencks Act is in -- is in place.

In other words, once the witness is -- the witness testifies at trial, and the witness's identity is unequivocally out in the open, then the witness's testimony and prior statements to the government are too. So you're quite right in what you said a few minutes ago, Your Honor, that there is going to come a time. There is going to come a time when witness identities are going to be out there, but now is not it.

THE COURT: Do you have an idea when the government would be willing to publish its government witness list?

MR. HARBACH: Well -- excuse me.

THE COURT: Ordinarily that happens, you know, within a reasonable period of time prior to trial.

MR. HARBACH: Yes, it happens within a reasonable amount of time prior to trial. I'm tempted to say depending on

when we were ordered to, we would have to assess that.

THE COURT: Right. Okay.

MR. HARBACH: I mean it's -- I'm just being honest.

THE COURT: No. No. No. That's fair.

Okay. So as far as the statements of the witnesses and the Jencks Act argument, are you aware of any authority, though, that says that if Jencks material is, again, implicated in a substantive pretrial motion, that even though it qualifies as Jencks, we redact it from public view?

MR. HARBACH: It's -- it's not just Jencks. It's Jencks -- and all of the Jencks material was produced subject to the protective order.

And give me one second. There was a point I want to make here.

THE COURT: Of course, the protective order, though, contained a provision that would allow the defendants to seek court authorization, so there is a mechanism in there, and as I said before, it doesn't supplant standard legal principles.

So I was unable to find any cases that say that by virtue of being Jencks material -- even if made part of a pretrial motion -- it then warrants redaction.

MR. HARBACH: Well, you wouldn't. It wouldn't be by virtue of it just being -- just by virtue of --

THE COURT: Or a witness statement, let's say, in a pretrial substantive motion.

MR. HARBACH: Well, the protective order intervenes, first of all. And if -- if -- this was part of what resulted us being in this position in the first place.

Give me one second.

You know, a protective order entered for good cause, in the government's view, means that there -- and we have made this point in our papers, so I will be brief. There has to be some showing from them. There has to be something. The -- the provision that Your Honor is talking about presupposes that. It doesn't -- it shouldn't operate -- and many cases say this -- that all -- if you're a defendant and you want to make something public, all you have to do is attach it to a motion and say, well, it's the government's burden now. That wouldn't -- that would gut the purpose -- that would gut the protective order in the first instance, that would eviscerate it.

So, again, the portion of the protective order that contemplates the process that Your Honor is talking about contemplates some showing. We have conferred with them repeatedly. They say nothing. They say nothing. So all we have to go on about why they are attaching something is what it says in the brief. And then all they say in any conferral is PII. We're trying.

THE COURT: No, and I understand. And I have appreciated the red box; those are very helpful. So I have

been able to go through those exhibits.

MR. HARBACH: So if -- okay. I -- I would like to move on, if it's all right with Your Honor.

THE COURT: Yes. It is 2:23. I want to make sure I give the other side a chance to weigh in on these issues.

MR. HARBACH: Understood.

Let's talk about grand jury materials just for a minute. Your Honor's order listed transcripts, exhibits, subpoenas, and orders from expired grand jury investigations. So I think it's useful to break that down.

The first three categories, grand jury transcripts, exhibits, and subpoenas, all of which are in play here, all of that has been produced as Jencks material or in discovery subject to the protective order.

So best case scenario, if you're looking for a disclosure, is that the standard that applies to discovery under a protective order should apply. In other words, one could take the view that that's grand jury material subject to Rule 6(e) and, therefore, that's the end of it.

My point is that, well, this is grand jury material that has been produced because we have an obligation to produce it. We have an obligation to produce it because it's Jencks material.

And so how should the Court treat that? The Court should treat that as material produced -- as discovery produced

in connection with the protective order.

THE COURT: So the 6(e) concerns are no longer active on that material; is that correct?

MR. HARBACH: I didn't say they were no longer active. What I mean to say is that the best argument for disclosure still -- still runs up against the discovery attached -- excuse me -- the discovery subject to a protective order to which there is no common law or First Amendment right of access. That's my point. It's not that 6(e) doesn't apply. It's that we need -- we need not rely on 6(e) to keep it out of the public eye because it's been produced pursuant to a protective order.

The last category of stuff orders from an expired grand jury investigation. Now, the defense has requested some of these from the government. And we've produced them. So they have them. We have produced them, again, subject to a protective order.

THE COURT: Uh-huh.

MR. HARBACH: But there is an additional complication with these; namely, that they're sealed. In other words --

THE COURT: So right now are there any proceedings underway to petition the D.C. court for a release of these materials? Because I think -- what I have seen in the papers thus far, there is anticipated challenges to some of those orders, and so they're going to become part of this judicial

proceeding in some form. And I'm trying to map out this -- any lingering 6(e) issues.

MR. HARBACH: Yes and yes. Yes, we see the same things you do about some of those materials being relevant to litigation that the defense intends to launch down here. And, yes, we are in the process of trying to get those things unsealed with redactions, so that they can be -- so that they can be released, and released publicly.

THE COURT: And that's on the bucket of orders, court orders.

MR. HARBACH: Well, orders or materials -- I will call them ancillary grand jury proceedings up there in Washington. There have been a few. I just mean --

THE COURT: Do you know how long it's going to take to get answers on that stuff?

MR. HARBACH: I -- less than a week, I would say.

THE COURT: Mr. Bratt is --

MR. BRATT: If I may speak from here, Your Honor.

THE COURT: Yes.

MR. BRATT: There is -- in conjunction, particularly with one of the motions -- what they styled the motion -- what the Trump defendant styled the motion for relief, we have begun that process. Because there are other parties with interests in that, we have to get them apprised as well. But once we get something to Chief Judge Boasberg, he usually rules pretty

quickly.

THE COURT: Okay. Okay.

MR. HARBACH: So it shouldn't take very long, Your Honor.

So that covers the grand jury materials.

Would you like to talk briefly about search warrant applications?

THE COURT: Am I correct that the grand jury investigations are, at this point, at least the D.C. one, has that expired?

MR. HARBACH: There is no current grand jury investigation underway in Washington related to this case.

THE COURT: Okay.

MR. HARBACH: But I hasten to add that that doesn't mean that 6(e)'s protections terminate either.

THE COURT: What happens if the defendants want to use that material in this judicial proceeding? Then the proper route would be to petition the Court in D.C. for use of those materials.

MR. HARBACH: The defense has already requested some of those materials. And the government has volunteered to intervene to try and obtain them.

THE COURT: Okay.

MR. HARBACH: And further, to obtain versions from the Court that could be publicly releasable. We're working on

that. That's where the redactions come in.

THE COURT: Okay. Any other categories in the prehearing order that you would like to address?

MR. HARBACH: Search warrant applications briefly.

THE COURT: Okay.

MR. HARBACH: I promise --

THE COURT: No, there is a lot.

MR. HARBACH: There is a lot. It's true.

The search warrant applications we have produced to the defendants in unredacted form. The search warrant applications have been produced to the defense in unredacted form. They've got all of them. That's the first point.

On the question of public access to those --

THE COURT: Uh-huh.

MR. HARBACH: -- several of them have been attached to their Rule 12 motions as exhibits.

THE COURT: Uh-huh.

MR. HARBACH: Unsurprisingly, since some of them are motions to suppress. And --

THE COURT: And that's not uncommon.

MR. HARBACH: That's right. And all that we're suggesting -- and this is what we have suggested to them -- is that, time out, there is a judge in the Southern District of Florida who has already entertained arguments about the openness of these search warrant applications. And in the case

of the search of Mar-a-Lago, progressively redacted more, I think, on three -- three occasions? Two or three occasions.

THE COURT: Of course, that was pre-indictment; correct?

MR. HARBACH: That's -- well, one of the -- one of the adjustments was post-indictment. And then another adjustment for the superseding indictment. So --

THE COURT: But you would agree that the analysis is a bit different when it's an indicted case versus in a pre-indictment posture?

MR. HARBACH: Yes, yes.

THE COURT: Okay.

MR. HARBACH: All I'm saying is that -- and, again, none of this concerns the defendants' access to it at all.

THE COURT: Right. But if they want to use these materials, it's done not, you know, rarely in the course of seeking suppression relief -- and I see this all of time. Attachments are filed as exhibits and we rule upon them. We have hearings. And there is really never any issue. But here there appears to be a serious issue.

MR. HARBACH: Okay. And I hope I have a proposal that might make some sense.

THE COURT: Okay.

MR. HARBACH: What we have proposed at the moment is that the -- the publicly facing versions of those search

warrant applications that Judge Reinhardt has already approved, be substituted immediately for the exhibits attached to the defendants' motions so that they can be released and be public facing. And, furthermore, that if, as we approach the hearing, the defendants believe that -- that Judge Reinhardt's decisions should be revisited about what should be redacted, they can make a motion.

Our point is, don't just assume that you can shift the burden to the government by attaching the unredacted motion to a motion to compel.

And I just want --

THE COURT: But that's a motion to suppress; correct? It's not a motion to compel.

MR. HARBACH: Sorry.

THE COURT: So we're back in the 12(b) stage. And why is it their burden to justify the sealing of information that they don't assert an interest in closure over?

MR. HARBACH: Because of the -- the residual protection that search warrant applications have. It may well be that a further unsealed version of that pleading is appropriate.

THE COURT: Okay.

MR. HARBACH: And that's why we've said fine, put the one that's publicly already been approved out there.

So -- and the last point is to something Mr. Woodward said this morning. He said he would have expected to know

about the existence of these public facing search warrant applications. I mean, we produced the unredacted versions to them. We only realized that it might even be relevant for them to know about redacted versions when they attempted to attach them as exhibits, and that's when we told them about them. So that -- there is just nothing there on that.

I will make one last point before I sit down about the Sixth Amendment, only because it's come up this morning.

I think Your Honor knows this. It's been mentioned nowhere in any of the defendants' briefing. And that, coupled with the fact that they have purported to take no position, means they should not be heard to claim that the Sixth Amendment right to a fair trial or a right to an open trial allows the relief that they're seeking. That's all I will say on that for now.

THE COURT: Okay. Thank you, Mr. Harbach.

Who is going to be taking the lead for defense counsel on this?

MR. BOVE: I'm going to address most of it, if that's okay with the judge.

THE COURT: Okay. Mr. Bove.

MR. BOVE: And Mr. Woodward is going to address the Rule 60 implication.

THE COURT: Okay. I'm ready.

MR. BOVE: Thank you, Judge.

So procedurally this is an absolutely frivolous motion. And that matters today because President Trump is here in this courtroom listening to that presentation when he should be preparing for super Tuesday and campaigning --

THE COURT: All right. I would like to talk about the merits of the motion, Mr. Bove.

MR. BOVE: And I would too, Judge. But if the shoe were on the other foot and we had filed a motion for reconsideration like this, I can only imagine the things that would be said about delay tactics.

THE COURT: Okay, okay. I take it -- that's fine.

Can we talk about the actual legal issues?

MR. BOVE: Yes.

THE COURT: I understand procedurally frivolous. Is your argument just related to time spent elsewhere, or does it have something to do with the mechanism by which motion -- the reconsideration was sought?

MR. BOVE: With respect to the procedural point, Your Honor has cited Chicago Tribune, the Press Coalition cited it. They didn't address it. These things -- I mean, they all but admitted it, standing here procedurally. But there are important interests at stake. And I want to address the merits head on.

President Trump is entitled to a public trial, and that includes public motion practice. There is nothing about the

protective order or any other aspects of these proceedings that changes that. And -- frankly, I had trouble following what was said at the end of Mr. Harbach's argument. But to the extent there was any suggestion that we have an obligation to join in their efforts to keep private materials that should be public or we forfeit our Sixth Amendment right, that also is completely frivolous.

THE COURT: Well, I think their point is that you haven't cited the Sixth Amendment in your papers, and that because there is a protective order in place, there is some degree of showing that you would need to make to get out from under the protective order rule.

MR. BOVE: We haven't cited the Sixth Amendment directly because the standard overlaps completely with the First Amendment standard we've been talking about; that's clear from footnote 16 of Ochoa Vasquez.

In terms of the protective order, it expressly contemplates in paragraph 7 that there would be some period of sealing, absent the government's consent, when we file a motion. And so in order to abide by that -- and I think this is important. In order to be consistent with the local rules requirement that you fix a time frame on the requested sealing, we made a submission to the Court, and we said we are not in the best position to assess the safety concerns that these guys are talking about.

And so if they want to make a showing, please do. We are not here to try and harm people or cause harassment to anyone. On the other hand, we don't know what they know.

The one exhibit submitted in this case to try and substantiate these positions, as Your Honor noted, another instance of improper ex-parte practice, only supports the proposition that when the government made gratuitous speaking allegations in an indictment, that led to harassment of a witness.

THE COURT: Okay. All right. Let's move on. I don't know if that is fully, fully the case.

Moving past that example, though, what is your view on the witness names as distinct from the substance of their statements?

MR. BOVE: I think it is the -- absolutely the government's burden to justify the redaction of those names. I have not seen any showing whatsoever with respect to the names at issue in any of the motions that have been filed. And --

THE COURT: I think their point is just more of like a -- it's -- it's just obvious. It's obvious that in a case of intense public scrutiny -- and there is some -- a little bit of arguable irony that where the First Amendment interests are at their apex, we're going to actually do less access. But I will leave that aside for a minute.

I think their point is that it's just a common sense

point that anybody whose name is associated with any of these high profile cases will just get online, you know, emails or tweets or whatever it is, and that we should -- we should accept that and then draw this, kind of, broad view that any witness's name should be shielded at least for now.

MR. BOVE: So I would just make a practical point, Judge, because from sitting here this afternoon, the command of the case law between the Court and the Press Coalition is pretty intimidating. But from a practical standpoint, we are at a place in this case where the government is charting a course that will make it virtually impossible to litigate. And just -- just the proposal that Your Honor referenced about creating aliases for each witness, tracking them throughout the case, that is fundamentally inconsistent with the Sixth Amendment right that we're talking about and the First Amendment right. And that is going to be a recurring issue, I think, when the silent witness rule comes up. Because I would expect there to be continued efforts to try and litigate this case in the dark. And that is something that we very much oppose.

And so we think there needs to be case specific reasons if there is going to be sealing, including with respect to names. We agree with the point about not needing to be prophylactic that you made. But at the same time, an exhibit relating to a different witness not at issue in any of our

materials, we don't think meets the government's burden to justify redacting names, substance of information, all of these things, out of our briefs.

THE COURT: What do you say to their point that in -- in many respects you haven't taken an affirmative position on sealing and certain filings? And then secondly, that some of your references to these individuals or their statements are gratuitous and unnecessary?

MR. BOVE: So with respect to our no position, that is informed by our information deficit. We don't have the access to information that they have about the alleged risks and harassment that people supposedly face. That's particularly problematic for us in terms of what position we would take when we're trying to address the request to hide the names of government participants.

And I think there is a basis in the case law and in logic to differentiate between government actors referenced in these materials as opposed to lay witnesses. We don't know. And so, no, we're not going to blindly do what they say. We're not going to blindly adopt their reasoning. We're not going to join in a submission to seal things from the Court that the Press Coalition then comes in and says President Trump wants to hide these things too. Because that's just not the case. If they can justify it, great. We're not here to cause harm, as I said. But it's on them.

And in terms of this word "gratuitous," they have a lot more binders today than I have, Judge, but if they want to bring up any exhibit that we've attached to these motions, I will address it specifically. There is nothing gratuitous in our filings. I think what they really mean is that they wouldn't have attached as many pages as we attached, and to that I must say, that's the only course for us. Because if we did something less than that, then we harm our position on the merits and we open ourselves up to the argument that they would inevitably make, and to some extent already have, that we are cherry-picking quotes from the documents and not giving a fair and complete treatment.

So that's -- that argument, I don't think it actually bears at all on the sealing frameworks of any -- any of those that we talked about. What it really is, is an attack on our integrity as litigators in suggesting that we, for some improper purpose, are attaching documents to a submission. That's false, outrageous. And if they want to specifically talk about any exhibit on here, let's get the binders out.

THE COURT: All right. Well, I don't know if time will permit that degree of detail.

MR. BOVE: I'm happy to not get into the binders also, Judge.

THE COURT: Okay. But just as far as the legal standards are concerned, let me just ensure that I haven't

overlooked anything.

Do you see any legal distinction in the applicable standard to apply as between, quote, discovery motions, like your motion to compel, versus the pretrial motions that are filed explicitly pursuant to 12(b)?

MR. BOVE: No. I think other than this effort to stretch Chicago Tribune, there is no basis for that. Our motions to compel are Rule 12(b) motions. There is -- this is a fabricated standard to try -- to -- in some position to be able to say that this motion for reconsideration wasn't frivolous, but there is no basis in the law for that.

THE COURT: Okay. All right. Anything you want to say on the category specifically? There is some grand jury stuff that I saw sprinkled in, and I just wanted to hear your views if they differ at all from what Mr. Harbach said.

MR. BOVE: They differ significantly, but I'm going to defer to Mr. Woodward on the grand jury part.

THE COURT: Okay.

MR. BOVE: On the search warrant affidavits, the idea that another judge's decisions applying a different framework with different considerations, in a pre-charge environment, should drive the Court's decision about sealing of those materials. It doesn't make any sense.

And, you know, again, from the practical perspective, this idea of, oh, we will just substitute in that exhibit, we

will dump this one in here, we will slot that one here -- we all have a lot of work to do. And if that needs to happen to protect someone, we're here for that. But if it needs to happen because it makes these guys feel better because they should have said more in the first motion, we're not here for that.

THE COURT: All right. Thank you.

Mr. Woodward.

MR. WOODWARD: Thank you, Your Honor.

I want to focus on the grand jury proceedings. I do want to touch on a few issues that Mr. Harbach raised that got us to the grand jury proceedings. I want to start with the protective order in this case and a few statements that Mr. Harbach made about the protective order, and his reliance on the fact that the protective order entered by another judge in this case gives good cause to the sealing of this information --

THE COURT: Well, wait a minute. It was a motion for a protective order that was unopposed --

MR. WOODWARD: Your Honor, if I may interrupt you right there.

THE COURT: Yes.

MR. WOODWARD: Mr. Nauta didn't have counsel in this case when that motion was filed. He didn't have counsel in that case when the motion was granted. And you will recall, I

came to see Your Honor in August of 2023 ex-parte, and I complained about the way that that protective order worked. Now, you subsequently --

THE COURT: There was no motion to lift it or to modify it.

MR. WOODWARD: No, Your Honor, there was not. But to say that I -- that we have not complained about the protective order is not true because --

THE COURT: But, if anything, that was lukewarm. It didn't result in a motion before the Court. And so I'm still left, at the end of the day, with a protective order that was entered without any opposition, as far as I can tell. And so that is in place.

MR. WOODWARD: That's correct, Your Honor. Now, the other thing that Mr. Harbach said about the protective order is that it's to apply to things like grand jury materials. However, in the million documents and millions of pages of materials that have been produced in this case, every single page has been designated subject to the protective order. Every single piece of discovery in this case has been designated subject to the protective order.

And the point that I made back in August is that, as a result, before we reference any discovery in this case, we have to come see Your Honor, assuming the government does not consent.

And the problem that I had back in August is that that means that I have to go to the government, disclose my defense strategy in the motion that I'm about to bring. They say, no, you cannot disclose.

They talk about a desire to not disclose witness information and witness identifications, and to keep that secreted, whether in the grand jury or otherwise. We're fighting over the sealing of Mr. Nauta's own statements. They've asked us to keep Mr. Nauta's own statements, his grand jury testimony, his FD302 form, sealed under the protective order. So there is no question that Mr. Nauta is not going to be a witness for the government in this case.

The second point that I will make is that we have concerns about the way that the -- they've handled this process. And we think that when they reference skepticism, we think Your Honor needs to look at this issue with a degree of skepticism. Take the grand jury issue, for example. What they were supposed to have done -- this is a sealing matter before Your Honor. It's not a case in the District of Columbia. And so what they were supposed to have done under Rule 6(e) is gone to the judge in the District of Columbia, petitioned that judge to transfer the material to Your Honor. And that judge --

THE COURT: But is that a mandatory procedure? Can't they just petition the judge for -- to make a finding that maybe the secrecy elements are no longer as -- as heightened.

MR. WOODWARD: That's -- that's right. They can ask the judge in D.C., and they have, to unseal the entire proceeding. But that's not what they're doing with respect to the materials they just referenced. They're not asking for the total unsealing of those materials. They're not going to identify the Trump attorney and those materials. And so they're abusing even that process. They're taking from Your Honor the authority --

THE COURT: So what relief can you seek then? If -- if you're not pleased with whatever mechanism they're using in the D.C. proceeding, then is there any avenue for you to -- for you to file a motion for such access, either there or here?

MR. WOODWARD: That's why I raise it now. I don't know.

THE COURT: Okay. But I can't work with just amorphous requests ore tenus. Like, I either get a motion or I don't.

MR. WOODWARD: What you can do, Your Honor, is you can force them to follow the rules, which is what you did. You can force them --

THE COURT: Which rule?

MR. WOODWARD: The rule against -- the rule of a presumption of disclosure. You can force them to make an articulate -- a particularized assertion for why materials need to remain sealed.

THE COURT: And that is clear. And I have said that

from the outset of this case, in numerous orders, even before the motion for reconsideration was filed. And so that, I think, is a baseline principle that I have voiced repeatedly. And here we are now trying to sort out these issues.

So in your view, Mr. Woodward, what do you think would be helpful for me to know as a matter of grand jury materials as referenced in the pretrial motions?

MR. WOODWARD: I think when they come to Your Honor with a D.C. grand jury document that is redacted and they ask you to honor those redactions, that's not the proper process. The proper process is to petition the D.C. district court, the chief judge there, to transfer that to you -- this is Rule 6(e). I mean, this is a Supreme Court case, 40 years ago this was decided by the Supreme Court. To transfer that to you. The judge can document, in this case, his concerns about unsealing, assuming he doesn't unseal the entire record. And then you, Judge, get to decide. They don't get to continue shielding their investigation in D.C. now that they've brought this case in Florida.

The Special Counsel references grand jury proceedings. I have been asking them for weeks now to identify all of the various grand jury proceedings that occurred in D.C. that have not yet been disclosed in this case. I know about several because I represented the witnesses in those cases. And I know that there is a substantial amount of litigation that occurred

before that grand jury that the Court doesn't know about, that my colleagues don't know about, that I can't talk to my client about because I'm under a sealing order in D.C.

I have asked them to identify each proceeding in the D.C. grand jury that involves this -- these -- this case. They haven't done it. I followed up with them on Tuesday night. I said, Where are we on this? No response.

THE COURT: Well, I think what they said is that they're in the process of petitioning the D.C. court for the unsealing, at least partially, of materials. I don't know if that's a comprehensive set. It's hard for me to know, but it sounds like there is a process underway.

MR. WOODWARD: I don't believe that they were referring to what I'm talking about -- they can correct me. I think they're referring to the motion -- the motion that has been submitted to the Court, not -- "under seal" is not the right way to say it -- but I don't believe that they're putting together -- Your Honor should have a list of -- it should be no different than if the grand jury investigation had been conducted in the Southern District of Florida. But Your Honor has no insight into what happened in D.C. They shielded all of that from this Court, and they're continuing to shield it from the defendants now.

So what we -- you know, the -- they ridicule us for taking no position, but you're right, Your Honor, it is not our

burden to justify sealing, which is why we filed the motions the way we did. We filed a motion to disclose discovery under the protective order. And in response, the Special Counsel's office still doesn't justify sealing.

Your Honor, I will just make two quick points on the identification of witnesses. You know, it's shocking to me that you suggest that we simply use monikers for all the witnesses and yet they reject that solution. I mean, what is actually going on here that precludes us from -- we've litigated a number of different proceedings here where we -- you know, "Trump Employee 1" or -- you know, why doesn't that work? Yet they don't defend or otherwise. You know, "it depends" is not an answer. We are not in law school anymore.

Finally, I also don't understand the difference between referencing material -- well, the reference to gratuitous attachments. Your Honor surely would not allow us to limit your review of case law to only the sections quoted or to only the page that is cited; right? That's not the way we operate. Context matters. And context matters in this case. It's not our obligation to go and cherry-pick, as my colleague, Mr. Bove, suggests, the sections of exhibits that matter to us. We would be misleading the Court; right?

Now, if the Court, in its prerogative, doesn't want to review the 37-page warrant affidavit, so be it. But for us to assume that the Court is uninterested in the -- in the portions

of the exhibits -- we don't do that at trial and we don't need to do that pretrial either.

And so unless the Court has any further questions for me, I will sit down.

THE COURT: All right. Thank you.

Any further defense argument on the sealing or redaction issues?

MR. IRVING: No, Your Honor. Not from me.

THE COURT: Any rebuttal from the government?

MR. HARBACH: Okay. Just a couple observations based on, I guess, Mr. Woodward's presentation, and I guess Mr. Bove made mention of this also.

The notion that they -- they made these gratuitously bloated exhibits attachments to their motions for the sake of completeness for the Court, first of all, if Your Honor will go back and look at the examples that I mentioned earlier in our pleadings.

THE COURT: Uh-huh. I think you told me pages 19 and 20 maybe?

MR. HARBACH: I think it may have been 14 and 15, but at this point --

THE COURT: I have it -- or I trust my -- one of my good law clerks will have written that down.

MR. HARBACH: Very well. Those are in there. And I'm -- I could definitely bring out the binders and go through

them, but I don't think that is necessary.

Here is the point. For something like that, the way this should have gone, they want to attach, you know, the entirety of something. They say, hey, David, we're interested in attaching this because we want to -- we want to be able to say in our motion that FBI agents were in communication on the day of the search warrant, and we think it's important that Judge Cannon know that. And that's all they would have to say. We say, okay, that exhibit that you're showing there, there is a lot of sensitive information in there. We think that -- here is a redaction that we propose that we think accomplishes your objective.

It's not cross-examination about defense strategy. It's not invading the defense camp about what their overall strategy is.

THE COURT: But it does require them to basically get your permission every time they want to file something. Isn't there something sort of unusual about that?

MR. HARBACH: It's not -- it's not -- it doesn't require them to get our permission. It does require them to get permission. And, unusual? Perhaps. But what's not unusual is the protective order, like the one that's at issue here. It has meaning. It's -- it's not just something we always do, even though we always do it. It's important, and especially under these circumstances.

THE COURT: Is there anything to make of Mr. Woodward's point that in the unclassified discovery universe, which I believe is over a million pages, that all of that is designated confidential?

MR. HARBACH: Well, all of that is subject to the protective order.

THE COURT: Okay. Or -- or -- yes, yes.

MR. HARBACH: Yes, it was all produced pursuant to the protective order. That is accurate.

THE COURT: So for a defendant to use any of that material, even if it really doesn't trigger sensitivity concerns, nonetheless, would require -- and I get it. This is in the protective order, and I think there is a mechanism to address it, and there have been motions to file discovery on the docket which now represent, I think, five motions, including the motion for reconsideration.

MR. HARBACH: All I hope is clear to Your Honor is that you shouldn't question our bona fides about being willing to work with them on that.

THE COURT: And I do not. I do not. To be clear, I know -- I can tell that you have made good faith efforts to work with them in terms of their redactions. You have offered the red box assistance which -- which isolates the issues. But I think what is clear is that these issues are complicated. And that trying to navigate these redaction sealing issues is a

challenge. So to try to find reasonable measures that are mindful of witness safety is certainly paramount, but, of course, the Court is obligated to respect the openness that is presumed in criminal proceedings. So I will endeavor to do that, take your motion for reconsideration under advisement.

Are there any other issues you wish to present now?

MR. HARBACH: No, Your Honor. Thank you.

THE COURT: Okay. Well, it is almost 3:00. We are on schedule. Thank you all for your time and attention today.

Thank you to all of the court personnel and the various security members of the courthouse and the Marshals Service for all they have done to make this hearing possible.

And that is all. Thank you.

(These proceedings concluded at 3:00 p.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

DATE: 03-06-2024

/s/Laura Melton
LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter
United States District Court
Southern District of Florida
Fort Pierce, Florida

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